81-2124

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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENT.

Petition for for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether the injury to the plaintiff school children found in 1974 justified a 1981 district court order which established a strict mathematical racial quota in layoffs of administrators and which voided the bona fide seniority rights of white school administrators guaranteed by a collective bargaining agreement and tenure rights under state law.

2. Whether procedural due process or section 703(h) of Title VII require a district court to make specific findings of fact to support an order depriving Petitioner's members of rights guaranteed by state tenure law and rights guaranteed by a bona fide seniority plan.

3. Whether the 1981 Order of the district court exceeded the limits of its remedial power in a public school desegregation case where it failed to eliminate a condition that violated the Constitution or flowed from such a violation.

4. Whether the 1981 Order "exceed[ed] appropriate limits" where it was not "... designed as nearly as possible 'to restore the victims of discriminatory conduct to the position which they would have occupied in the absence of such conduct.' "

5. Whether the 1981 Order voiding collectively bargained seniority rights, reversing a school committee decision to honor its agreement, and abrogating tenure rights under state law "... take[s] into account the interests of state and local authorities in managing their own affairs ...".

Opinion Below.

The opinion of the Court of Appeals, appears at Appendix A1. The transcript of the July 9, 1981 order of the United States District Court for the District of Massachusetts, appears at Appendix A17-22.

Jurisdiction.

The Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1) because the judgment and opinion of the United States Court of Appeals for the First Circuit was entered on February 17, 1982.

Constitutional Provision Involved.

Fourteenth Amendment, Section 1:

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Statutory Provisions Involved.

1. 1964 Civil Rights Act, section 703(h), 42 U.S.C. § 2000 e-2(h):

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an

unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

2. Massachusetts General Laws Chap. 71 sec. 42A:

§ 42A. Rights of School Principals and Supervisors and Certain Other Persons in Cases of Demotion.

No principal, supervisor, assistant principal, or professional employee performing the duties of a principal, supervisor, assistant principal, by whatever title his position may be known, who has served in that position for over three years shall without his consent be demoted except for inefficiency, incapacity, unbecoming conduct, insubordination or other good cause; nor unless, at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his demotion is proposed; nor unless, if he so requests, he has been given a hearing before the school committee, which may be either public or private at the discretion of the school committee, and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless the superintendent shall have given the committee his recommendations thereon.

For the purpose of this section, a person shall be deemed to have been demoted if his salary has been reduced contrary to the provisions of section forty-three of this chapter or if he has been transferred without his

consent to a position wherein he no longer serves at discretion.

Any person who has been demoted by vote of a school committee under the provisions of this section may within thirty days after the vote of dismissal or demotion appeal therefrom to the superior court in the county in which he was employed. (1945, 330; 1953, 269; 1975, 199, approved May 9, 1975, effective 90 days thereafter).

3. Massachusetts General Law Chapter 150E.

The Massachusetts Public Employee Collective Bargaining statute creates enforceable collective bargaining rights. The statute is not reprinted as it is not specifically relied upon in the Petition.

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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner Boston Association of School Administrators and Supervisors, AFL-CIO ("BASAS") respectfully prays that a writ of certiorari issue to review a February 18, 1982 judgment of the United States Court of Appeals for the First Circuit.[1]

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[1] The parties in the Court of Appeals were: a) plaintiffs—Tallulah Morgan, et al. as representatives of the class of plaintiffs which includes black public school students and their parents; b) four defendants—Boston School Committee, City of Boston, State Board of Education and State Commissioner of Education; c) four intervenors—Petitioner Boston Association of School Administrators

Statement of the Case.

This is a 1972 school desegregation case in which black children attending Boston public schools and their parents have sought to redress the denial of equal educational opportunity. Jurisdiction of the action was invoked under 28 U.S.C. § 1343.

In 1974 the district court found the Boston School Committee liable for the intentional segregation of the Boston schools along racial lines. *Morgan v. Kerrigan*, 379 F. Supp. 410 (D. Mass. 1974), *affirmed*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).[2]

In 1976 the district court issued its Order for the Desegregation of Administrative Staff. The Order affected administrative positions which are included in the BASAS bargaining unit. The 1976 Order, which appears at Appendix A23, was not appealed.

The 1976 Order required that administrative vacancies be filled according to a one black-one white ratio until the percentage of black administrators reached twenty percent.[3]

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and Supervisors, Boston Teachers Union, Concerned Black Educators of Boston and El comite de Padres. The A. Phillip Randolph Institute filed as an amicus curiae.

[2] The original findings of the district court which related to employment practices of the Boston School Committee appear in *Morgan v. Kerrigan*, 379 F. Supp. 410 at 456-466. The plaintiffs' principal claim was that "... defendants have knowingly pursued policies resulting in racial segregation of teachers and administrative personnel, thereby reinforcing the racial identifiability of schools and increasing the racial segregation of students." 379 F. Supp. at 456. The district court found adequate support for that claim.

[3] The 1976 Order established three administrative categories. Principals and headmasters comprised Category I. Categories II and III include assistant principals, assistant headmasters and various other administrative positions. Only Category I adminis-

The School Committee was further ordered to adopt recruitment policies in order to reach an ultimate goal of 25% black administrators although it was relieved of the one-to-one hiring obligation once the 20% goal was reached. By 1981 the percentage of black Category I administrators was 20.53.

Since 1975 Massachusetts law has required school committees to collectively bargain with their principals. The collective bargaining agreement between BASAS and the Boston School Committee contained an article which governed layoffs, and which required layoffs by "inverse order of seniority." Seniority was defined as an administrator's period of permanent service in the administrative position or the total period of service in the administrative position if the employee's acting service was continuous with permanent appointment. Section 3(a); Appendix A35.

The layoff clause provided no protection for administrators who were not tenured under Massachusetts law.[4] Nor did the layoff clause provide protection to acting administrators (i.e., administrators who had not been permanently appointed pursuant to the 1976 Order). The layoff clause required that these unprotected employees be laid off prior to the layoff of any protected (i.e., permanent *and* tenured) employee in the affected job category. Section 4(a) and (b); Appendix A36.

In 1981 the School Committee ordered twenty-eight schools to be closed in the 1981-1982 school year. These school closings necessitated a reduction of twenty-eight headmaster and principal positions. Thirteen positions were eliminated either because the positions were occupied by acting

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trators are involved in the present case. The 1976 Order also altered the process by which vacancies in administrative positions were permanently filled by providing community and parent input into that process.

[4] The Massachusetts administrator's tenure law, M.G.L. c. 71, § 42A (reprinted at page iii, *supra*), requires three years of service in order to be entitled to its protections.

employees or because the employee retired.[5] It was thus necessary to lay off fifteen permanently appointed Category I administrators.

The School Committee, on July 7, 1981, ordered that strict seniority be the layoff criterion. Using a seniority criterion, the percentage of black administrators would have been 13.8%.

The 1981 Order of the district court required that the twenty per cent level of minority administrators be maintained resulting in the layoff of seven permanent tenured white administrators in violation of state law and the collective bargaining agreement.[6] This Petition seeks review of the First Circuit's judgment affirming that Order.

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[5] Of these thirteen positions, five had been occupied by blacks and eight by whites. Accordingly, before any layoffs were effected, the percentage of black Category I administrators had dropped from 20.53% to 18.84%.

[6] The district court order resulted in the following individuals being laid off:

Name	*Position*	*Seniority Date/Race*
1. Richard Brown	Principal	8/21/79-B
2. Clare Joyce	Principal	8/21/79-W
3. Edmund Cardoni	Principal	8/25/78-W
4. William O'Connell	Principal	9/7/77-W
5. Thomas McLaughlin	Principal	9/7/77-W
6. Joseph Bage	Principal	4/25/77-W
7. Gerald McGrath	Principal	9/7/76-W
8. Virginia Duseau	Principal	9/1/76-W
9. Sally Gorham	Principal	8/16/76-W
10. John Gillis	Principal	8/16/76-W
11. Donald DeGrandis	Principal	8/16/76-W
12. Janet Short	Principal	8/16/76-W
13. Joseph Lee	Principal	8/16/76-W
14. Joseph McKeigue	Principal	8/16/79-W
15. Christopher Lane	Headmaster	8/21/79-W

Reasons for Granting the Writ.

THIS CASE PRESENTS A NUMBER OF IMPORTANT QUESTIONS OF FEDERAL SCHOOL DESEGREGATION AND EMPLOYMENT LAW WHICH SHOULD BE SETTLED BY THIS COURT.

I. WHETHER A STRICT MATHEMATICAL RACIAL QUOTA WHICH VOIDS BONA FIDE SENIORITY RIGHTS AND STATE LAW TENURE RIGHTS IS A PERMISSIBLE REMEDY IN A SCHOOL DESEGREGATION CASE.

The Court has approved the use of mathematical racial ratios only as a starting point in the process of eliminating a dual school system. The Court has expressly disapproved the use of racial quotas which require a particular degree of

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The School Committee order that seniority be the layoff criterion would have resulted in the following individuals being laid off:

Name	*Position*	*Seniority Date/Race*
1. Clare Joyce	Principal	8/21/79-W
2. Richard Brown	Principal	8/21/79-B
3. Callannye Thomas	Principal	8/25/78-B
4. Clifford Janey	Principal	8/25/78-B
5. Michael Fund	Principal	8/25/78-O
6. Edmund Cardoni	Principal	8/25/78-W
7. Curtis Wells	Principal	9/7/77-B
8. John Cunningham	Principal	9/7/77-B
9. William O'Connell	Principal	9/7/77-W
10. Thomas McLaughlin	Principal	9/7/77-W
11. Bernice Johnson	Principal	9/7/77-B
12. Joseph Bage	Principal	4/25/77-W
13. M. Tames Denniston	Principal	2/28/77-B
14. Dean Yarborough	Principal	2/28/77-B
15. Stacy Johnson	Headmaster	4/16/80-B

Accordingly, seven principals (McGrath, Duseau, Gorham, Gillis, DeGrandis, Short and Lee) who were laid off because of the district court order would not have been laid off under a seniority based layoff.

racial balance as a matter of substantive constitutional right. *Swann v. Board of Education*, 402 U.S. 1, 23-25 (1971); *Pasadena Board of Education v. Spangler*, 427 U.S. 424, 433-435 1976). The 1981 Order of the district court voided the seniority rights and tenure rights of certain Boston principals solely on the basis of their race in order to meet a 20% racial ratio of black principals.

In *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). The Court approved an affirmative action plan which accorded racial preferences in selecting employees for a promotional training program because the plan did not "... unnecessarily trammel the interests of white employees." Moreover the rights asserted by Brian Weber, unlike the rights asserted by Petitioner, were not derived from a collective bargaining agreement because the affirmative action plan he challenged was itself created by the collective bargaining agreement. Finally, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) the Court invalidated a preferential admissions program that used race as the sole criterion for eligibility. While acknowledging that race may be taken into account in a university admissions program, Mr. Justice Powell made clear that the state bore a substantial burden of justification even when race was one of many criteria. *Id.* at 320.

II. Whether the Decisions of this Court Under Procedural Due Process and Section 703(h) of Title VII Require that the Abrogation of Tenure and Seniority Rights Be Supported by Specific Findings.

The Court's decision in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) established that as a prerequisite to the grant of retroactive seniority rights in contravention of the rights of otherwise senior members of a collective bar-

gaining unit, a district court must make specific findings that the beneficiaries of its order were victims of defendant's illegal action. In the absence of such specific findings all *bona fide* seniority systems are inviolate. The Petitioner's seniority system is clearly *bona fide* under the criteria announced in *Pullman-Standard* v. *Swint*, __ U.S. __, 50 U.S.L.W. 4425 (April 27, 1982). Moreover no contention was raised and no findings were made that the BASAS seniority system failed to meet the *Swint* criteria of neutrality, rationality in light of industry practice, freedom from a discriminatory genesis and freedom from illegal purpose.

Further *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and subsequent cases involving tenure rights of government employees establish that public employment is an entitlement which vests in its holders property rights which can be deprived only after notice and an opportunity to be heard. Thus constitutional and Title VII principles require a hearing in which the court makes factual findings and issues an appropriate remedy with consideration of the rights of employees to whose disadvantage such an order might run. The failure of the district court to make findings or to hold hearings prior to divesting employees of an entitlement invalidates the court's 1981 Order.

III. Whether the District Court Exercised Its Remedial Power to Eliminate a Condition which Violated the Constitution or which Flowed from such a Violation.

Milliken v. *Bradley*, 433 U.S. 267 (1977) required that school desegregation orders be aimed at the elimination of constitutional violations or conditions which flowed from such violations. The nature of the constitutional violation in the case *sub judice* was that the School Committee had formulated and implemented policies which had injured black

students by denying them an equal educational opportunity. The 1981 Order of the district court can be said to have satisfied the first *Milliken* critrion only if the plaintiffs are entitled, as a matter of substantive right, to an administrative staff which is 20% black.

The 1976 Order for the Desegregation of Administrative Staff was aimed at eliminating segregative employment practices. That Order defined a "shortage" of black administrators as less than 20%. The 1976 Order did not require displacement of existing employees and their replacement by newly hired black employees. It did however provide a racial preference in the form of a one-to-one hiring ratio until such time as the "shortage" was eliminated. The 1976 Order achieved the dual purpose of eliminating intentionally segregative employment practices and compensating the plaintiffs, through the hiring preference, for the injury caused by those practices.

The cure for the disease which was ordered in 1981, considering its impact upon wholly innocent employees, is far more severe than the racial preference provided in 1976 and is as destructive of constitutional rights as the School Committee's unconstitutional actions ten years earlier.

IV. Whether the 1981 Order Was Designed as Nearly as Possible to Restore the Victims of Discriminatory Conduct to the Position which They Would Have Occupied in the Absence of such Conduct.

There are two senses in which the second *Milliken* criterion bears on the case *sub judice*. The first sense measures the order by its impact on the plaintiff school children. The second measures the order by its impact upon the affected employees.

The victims of discriminatory conduct are the black school children who were denied equal educational opportunity. The Court of Appeals explained that the 1981 order benefited the plaintiffs by providing them with adult role models. There were no findings made that the plaintiffs required role models in order to be made whole. Indeed in 1974 the district court rejected the defendant's argument that "... assignment of black teachers to predominantly black schools is educationally justifiable because black teachers serve as adult role models and inspirational examples to black pupils." *Morgan* v. *Hennigan*, 379 F. Supp. 410, 460 (D. Mass. 1974). The Court of Appeals affirmed, citing the lack of record evidence on that point. *Morgan* v. *Kerrigan*, 509 F. 2d 580, 596 (1st Cir. 1974). Whatever force the role model thesis may have when applied to teachers is further diluted by its application to a systemwide administrative staff. Because there is only one principal in each school the benefit to the plaintiff black students of having a particular percentage of black principals accrues only to those students who happen to be in a school with a black principal.

The second sense in which the second *Milliken* criterion applies to this case is in a strictly employment context. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) authorized the use of retroactive seniority to restore specific victims of employment discrimination to the position on the seniority list that they would have occupied in the absence of such discrimination. The direct, make whole benefit to the employee victim justified the deprivation to the innocent white employee whose seniority status was thereby diminished. The case *sub judice* contains no employee victims who require retroactive seniority in order to be made whole. Black principals have been granted seniority rights superior to white principals not because they were victims but because they are black. The justification for this remedy is found only in the remote and indirect benefit accruing to the plaintiff students.

V. Whether the 1981 Order that Voided a Collectively Bargained Seniority Agreement, Reversed a School Committee Decision to Honor Its Agreement and Abrogated State Tenure Rights Took into Account the Interests of Local Authorities in Managing Their Own Affairs.

A federal court must take into account the interests of state and local authorities in managing their own affairs when it devises a remedy in a school desegregation case. *Milliken v. Bradley*, 433 U.S. 267, 281 (1977). The interest of local school authorities in managing and staffing their schools is fundamental. When local authority is displaced by state government, federal government or judicial decree local support for schools and local confidence in the educational system is eroded:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.

Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

While local control that violates the Constitution can claim no immunity from federal court order there has been no finding that the defendant school committee's employment practices relating to administrators have violated the Constitution since 1974. Indeed the record is quite the opposite. The Boston School Committee has not only remained free from subsequent violations but it, with the cooperation of Petitioner's members, has been engaged in one of the most difficult and extensive remediation programs in the history of the United States. When school closings in 1981 mandated a reduction in administrative force the school committee affirmed its obligation under an agreement negotiated pursu-

ant to state law. It also acted in accordance with a state tenure law passed by the Massachusetts legislature in 1945. The school committee's decision to adhere to seniority as the layoff criterion for principals was an acceptance of its primary responsibility to assess and solve its own problems. The imposition of the district court's judgment for that of the school committee failed to "... take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 281 (1977).

* * *

Finally, the facts upon which this Petition is based present an appropriate context for a clear and precise statement of governing principles. The case directly impacts only eight employees. The facts are not disputed. A decision by the Court in favor of Petitioner will not result in substantial disruption to the school system. Seven, perhaps eight,[7] employees will have to be reinstated to the positions from which they were laid off. The important issues raised by this case should be addressed in a discrete factual setting so that maximum guidance will be provided to the judiciary, employers and working people. This case offers an appropriate setting.

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[7] The eighth employee, Christopher Lane, was the only headmaster to be laid off. Lane had more total service than Stacy Johnson. See note 6, *supra*. Neither Lane nor Johnson had the three years of service necessary for state law tenure and protection against layoff under the collective bargaining agreement. Accordingly the School Committee could have retained Johnson without violating the BASAS agreement, thus producing a black Category I ratio of 14.6%.

Conclusion.

For the foregoing reasons the Petitioner respectfully prays that a writ of certiorari issue to review the February 17, 1982 judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,

By its Attorneys,

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United States Court of Appeals
For the First Circuit

No. 81-1561.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN O'BRYANT, ET AL.,
DEFENDANTS-APPELLEES,

LOCAL 66, BOSTON TEACHERS UNION,
AFT, AFL-CIO,
INTERVENOR-APPELLANT.

No. 81-1617.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN D. O'BRYANT, ET AL.,
DEFENDANTS-APPELLEES,

BOSTON ASSOCIATION OF SCHOOL
ADMINISTRATORS AND SUPERVISORS,
PLAINTIFF-APPELLANT.

No. 81-1618.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN D. O'BRYANT, ET AL.,
DEFENDANTS-APPELLEES,

CONCERNED BLACK EDUCATORS OF BOSTON,
PLAINTIFF-INTERVENOR, APPELLANT.

No. 81-1619.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN D. O'BRYANT, ET AL.,
DEFENDANTS-APPELLEES,

CONCERNED BLACK EDUCATORS OF BOSTON,
PLAINTIFF-INTERVENOR, APPELLANT.

No. 81-1646.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN D. O'BRYAN[illegible] ET AL.,
DEFENDANTS-APPELLEES,

CONCERNED BLACK EDUCATORS OF BOSTON,
PLAINTIFF-INTERVENOR, APPELLANT.

JUDGMENT

Entered: February 17, 1982

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The order of the District Court of June 2, 1981, and the order of July 24, 1981 denying reconsideration of that order are affirmed;

The order of the District Court of July 9, 1981, is affirmed; and

The order denying Concerned Black Educators of Boston's motion to rescind the June 2, 1981 order is affirmed.

No costs on appeal.

By the Court:

DANA H. GALLUP,
Clerk.

[cc: Messrs. Miller, Kelly, Johnson, Simonds, Blumenthal, Somers, Mss. Playter and Gertner]

CONCERNED BLACK EDUCATORS OF BOSTON,

INTERVENOR, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Bruce A. Miller, with whom *Christopher P. Legghio, Stuart M. Israel, Miller, Cohen, Martens & Sugarman, P.C., James T. Grady*, and *Grady and McDonald* were on brief, for Local 66, Boston Teachers Union, AFT, AFL-CIO.

Paul F. Kelly, with whom *Richard W. Coleman*, and *Segal, Roitman & Coleman* were on brief, for Boston Association of School Administrators and Supervisors, AFL-CIO.

Caroline B. Playter, with whom *Doyle, Playter, Novick & Berkin*, and *Kenneth Kimerling* were on brief, for El Comite De Padres.

Larry J. Johnson, with whom *Robert Pressman*, was on brief, for *Tallulah Morgan, et al.*

Marshall Simonds, with whom *Henry C. Dinger*, and *Goodwin, Procter & Hoar* were on brief, for Boston School Committee.

Robert H. Blumenthal, Counsel, Department of Education, with whom *Robert H. Bohn, Jr.*, Special Assistant Attorney General, was on brief, for Board and Commissioner of Education.

John Somers, on brief for The A. Philip Randolph Institute, amicus curiae.

Nancy Gertner, Charles W. Rankin, and *Silverglate and Gertner*, on brief for Concerned Black Educators of Boston.

February 17, 1982

CAMPBELL, *Circuit Judge*. These consolidated appeals are from orders of the district court in the Boston school desegregation case. A short history may prove helpful. In 1974, the district court found that Boston public school

authorities had knowingly engaged in a policy of racial discrimination and intentionally maintained a dual school system along racially segregated lines. *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974). This court affirmed. *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The basic remedial orders were entered in 1975 and affirmed in 1976. *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). In addition to holding that pupil assignment and other actions were discriminatory, the district court found that defendants discriminated in the area of faculty and staff hiring[1] and assignment. 379 F.Supp. at 456-66. Accordingly, the court ordered that black and white teachers be hired on a one-for-one basis until the percentage of black faculty reached 20 percent (the approximate percentage of blacks in Boston at that time),[2] with affirmative recruitment to continue until a figure of 25 percent black faculty was reached, *Morgan* v. *Kerrigan*, 388 F. Supp. 581 (D. Mass. 1975), and this court affirmed, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). An order to the same effect with respect to administrators was entered on February 24, 1976; this order was neither published nor appealed. In 1978, the district court found that the defendants had not complied with its faculty recruitment and hiring orders, and therefore modified those orders to require that the percentage of black teachers increase annually by at least

[1] In 1972-73, 5.4 percent of the permanent teachers were black; in 1970-71, 3.5 percent of the administrators were black. 379 F. Supp. at 463.

[2] The percentage of black students in the Boston public schools at that time was approximately 35 percent. *Morgan* v. *Kerrigan*, 388 F. Supp. at 582. Preliminary 1980 census figures show an overall black population in Boston of over 22 percent; the projected percentage of black children in the Boston public schools for 1981 was over 46 percent.

one and one-half percentage points until the 20 percent goal was attained. This unpublished order was entered July 5, 1978 and was not appealed.

By early 1981, the percentage of black teachers was 19.09 percent and that of black administrators 20.53 percent. This progress was threatened, however, by a budget crisis precipitated by decreased funding. In order to comply with its reduced budget, the Boston School Committee considered massive layoffs of teachers and administrators. It was faced, however, with conflicting obligations: on the one hand, its collective bargaining agreements called for layoffs by reverse seniority; on the other, such a procedure would drastically reduce the percentage of black teachers and administrators (most of whom had been hired in the last few years and thus had little seniority), in violation of the district court's desegregation orders. The School Committee decided that if layoffs of teachers proved to be necessary, they should be conducted so as to maintain the current percentage of black teachers, but layoffs of administrators, if necessary, should be conducted by reverse seniority. It filed motions with the district court for approval of these decisions. On June 2, 1981, the district court granted the motion — with minor modifications — with respect to the teachers.[3] On July 9, 1981, it denied the motion with respect to the administrators and ordered that the percentage of black administrators be maintained even in the face of layoffs.

The court's orders were conditional. That is, they did not themselves mandate any layoffs. Rather, they simply specified the principles determining who should be laid off if,

[3] The order also specifies that laid-off black teachers will have an absolute preference in recall until the 20 percent goal is reached. The order suspends the defendants' obligation to engage in affirmative recruitment aimed at reaching a goal of 25 percent black faculty, until all tenured teachers who are laid off have been recalled.

for reason of economics or otherwise, layoffs were in fact made. Layoffs have since taken place in accordance with the priorities established in the court orders, thus maintaining the existing percentages of black faculty and administrators at close to 20 percent. The Boston Teachers Union ("BTU") asserts that between 700 and 1,100 teachers have been laid off. If the seniority approach had been followed, this would have reduced the percentage of black teachers to somewhere around 8 percent. Our information on the administrators from the Boston Association of School Administrators and Supervisors ("BASAS") is more precise: 15 headmasters and principals with permanent appointments were laid off. If seniority had been followed, 13.8 percent of those remaining would be black.

The appeals consolidated here for our review are as follows. In No. 81-1561, intervenor BTU appeals from the June 2 order and from the district court's denial of its request for reconsideration of that order on July 24, 1981. The plaintiff class, the School Committee, the State Board of Education, and intervenors El Comite de Padres Pro Defense de la Educacion Bilingue and Concerned Black Educators of Boston ("CBEB") have filed briefs as appellees; the A. Philip Randolph Institute has filed a brief as *amicus curiae* urging reversal. In No. 81-1617, intervenor BASAS appeals from the July 9 order. The appellees are the same as those in No. 81-1561, with the exception that the School Committee takes no position in this appeal. Finally, Nos. 81-1618, 81-1619, and 81-1646 are appeals brought by CBEB arguing that the orders do not go far enough in remedying past discrimination. No. 81-1618 is from the June 2 order; No. 81-1619 is from the denial of CBEB's motion to rescind that order; and No. 81-1646 is from the July 9 order.

The standards for equitable remedies in school desegregation cases have been set forth by the Supreme Court in *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977). As dis-

cussed *infra*, we believe that the district court committed no abuse of discretion under *Milliken*, and we therefore affirm its orders. We note additionally, however, that the procedural posture of this case also argues for an affirmance. BTU asserted virtually none of the arguments it now presents on appeal to the district court during the argument conducted below concerning the faculty order entered June 2. At that argument, it chiefly spoke against the need for any layoffs and also against proposals to tailor the layoff procedure so as actually to increase beyond present ratios the percentage of black faculty. As far as we can glean from the record, it did not argue that the Boston School Committee's proposed formula for laying off teachers — the formula largely adopted by the district court — would involve unconstitutional discrimination, nor did it make any request for an evidentiary hearing, until its motion for reconsideration filed almost seven weeks after the original order. The district court must have broad discretion in deciding such motions for reconsideration, especially where no reasons are advanced for the movant's failure to present its arguments earlier. *Cf. Willens* v. *University of Massachusetts*, 570 F.2d 403, 406 (1st Cir. 1978) (discretion to grant relief from judgment). Similarly, BASAS did not argue that the district court's maintenance approach was unconstitutional at the July 9 hearing on the motion with respect to the administrators. Finally, CBEB had filed no motions until after the June 2 order was entered; the district judge understandably expressed considerable doubt as to his ability to grant the relief CBEB requested in the absence of a prior motion. On appeal, the district court's exercise of its discretion is judged by the information and motions before it at the time it rendered its decision — not by hindsight. On this basis, it would be difficult — quite apart from our view of the substantive merits as discussed below — to overturn the lower court's handling of the various issues then before it.

The importance of this case, however, and its human impact, naturally make us hesitant to decide on procedural and technical grounds. We thus turn to the merits of the controversy. The first *Milliken* requirement is that, "like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the *condition* alleged to offend the constitution. . . .' " *Milliken* v. *Bradley*, 433 U.S. at 280 (citations omitted; emphasis in original). It is plain that the present order, aimed at preserving a goal concerning the percentage of black teachers and administrators, is directly related to the unconstitutional conditions earlier found by the district court. This court has twice upheld the underlying district court orders concerning the percentage of black faculty as part of the desegregation remedy. *Morgan* v. *Kerrigan*, 509 F.2d 599 (1st Cir. 1975); 530 F.2d 481 (1st Cir. 1976). In 1975, we said that, having "found pervasive violations of the constitutional rights of black school children in the Boston schools," the district court had an "obligation . . . to rectify those violations," and we concluded that orders related to the percentage of black faculty "are directed toward the objective of eradicating the segregated system that has prevailed in the Boston schools, and [are] clearly within [the district court's] power in the context of this case." 509 F.2d at 600-01. We further held in 1976 that the 20 percent goal was a valid part of the effort "to eliminate segregation and its effects 'root and branch,' " 530 F.2d at 432, *citing Green* v. *County School Board*, 391 U.S. 430, 438 (1968). The 20 percent formula is thus clearly a part of the remedy earlier approved in this case to rectify the unconstitutional conditions found to exist. The purpose of the orders under review is to safeguard the progress toward desegregating the faculty and administrative staff — and thus the progress toward dismantling the dual school system — already made.

Unlike BASAS, BTU never really argues otherwise. Rather, it asserts that desegregation has now been accomplished and that the district court's powers are therefore at an end. *See generally Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). This argument has no basis in the present record, however. We find no indication that BTU ever moved in the district court that the court should withdraw, nor has it requested a hearing for the purpose of introducing evidence in support of such a motion.[4] Absent proceedings and proof showing that Boston's dual school system has been abolished, the district court retained power to make orders premised on the unconstitutional conditions it found to exist.[5]

We turn next to the second *Milliken* requirement: "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' " *Milliken* v. *Bradley*, 433 U.S. at 280 (citation omitted; emphasis in original). Ap-

[4] While BTU's motion for reconsideration included a request for an evidentiary hearing, *see infra* p. 13, that hearing was, as stated in the motion, "for the purpose of fully reviewing the impact on all the parties of the Court's June 2 order."

[5] The record before us amply supports a conclusion that the desegregation remedial goals have not been fully achieved. The 25 percent goal, which this court characterized as a "built-in terminus for court responsibility," *Morgan* v. *Kerrigan*, 530 F.2d at 434, is not even close to fulfillment. The 20 percent goal has been barely achieved with respect to the administrators and is close to achievement with respect to the teachers. This goal, however, was never intended to delimit the court's remedial powers, and, moreover, we noted that "time may indicate the goal to be too modest." *Id.* The plaintiff class has indicated below that it desires to increase the 20 percent figure to over 22 percent. The court stated that its rulings here under review were without prejudice to the proposals to increase the 20 percent goal.

pellants BTU and BASAS contend that the orders do not satisfy this requirement because they benefit black teachers and administrators who were never shown to be the victims of hiring discrimination. They cite cases such as *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), which they contend limit the award of retroactive seniority and like benefits to identiable victims of hiring discrimination. The argument is that the district court's orders discriminate in employment and that they lack the proper factual predicate because no minority individuals have been identified as the victims of any discrimination.

A similar argument was made to this court when the 20 percent goal was first ordered, and we rejected it then, as we do now:

> This argument fundamentally misapprehends the nature of this case. The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. The district court's examination of the School Committee's ... policies was undertaken to determine whether those policies violated the rights of black Boston public school children. It is the rights of those children that the order in issue is intended to protect.

Morgan v. *Kerrigan*, 530 F.2d at 432. *See also Morgan* v. *Kerrigan*, 509 F.2d at 600 n.3. It has been recognized from the beginning that the victims here are the black school children, not the possible hiring discriminatees. *See Morgan* v. *Hennigan*, 379 F. Supp. at 456. The orders are thus designed, insofar as possible, to make the school children whole. Proof of individual hiring discrimination is irrelevant. The employment cases cited by appellants are inapposite as to this issue. *See Arthur* v. *Nyquist*, 520 F. Supp. 961, 966 (W.D.N.Y. 1981).

The plaintiff class has a right to an education in a school system free of racial discrimination in the employment of teachers and staff. *Morgan* v. *Hennigan*, 379 F. Supp. at 456, 463. The elimination of the vestiges of a segregated school system cannot be accomplished until the effects of past hiring discrimination have been eradicated. *See supra* pp. 6-7. Such discrimination, if allowed to continue, may lead to difficulties in fully integrating the schools and in eliminating the maintenance of a dual school system. An integrated faculty and staff is also necessary to bring black students and parents fully into the school community and decisionmaking processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models, which may be "important because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race." *Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732, 748 (W.D. Mich. 1980), *appeal pending*. We thus conclude that the orders here are remedial: they are designed to make the children whole, to vindicate their rights, and that is indeed their effect. Indeed, under the principle of the law of the case, such a conclusion is compelled by our past decisions in this case.

Appellants argue further that even if these orders are remedial, they constitute forbidden racial preferences. Once again, we have already rejected a similar argument with respect to the one-for-one hiring ratio, *Morgan* v. *Kerrigan*, 530 F.2d at 432 n.2, and we do so now with respect to the instant orders. Once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination. *See, e.g., Fullilove* v. *Klutznick*, 448 U.S. 448, 477-78 (1980) (Burger, C.J., announcing the judgment of the Court); *id.*, at 517-19 (Marshall, J., concurring in the judg

ment); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 305 (1978) (Powell, J., announcing the judgment of the Court); *id.*, at 362-79 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Indeed, once a court has found racial discrimination in a school case, race-conscious remedies not only are permitted, they are said to be required where color-blind approaches would be inadequate. *See, e.g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 28; *Green* v. *County School Board*, 391 U.S. 430 (1968).

There are, of course, limits to the use of race-conscious remedies, whether they be statutory or court-ordered. We have stated that

> racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. . . . [T]he means chosen to implement the compelling interest should be reasonably related to the desired end.

Associated General Contractors of Massachusetts, Inc. v. *Altshuler*, 490 F.2d 9, 17-18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). The constitutional violations found in this case certainly, under the precedents cited *supra*, constitute the "compelling need" for a race-conscious remedy. Once this has been established, the proper test is essentially one of reasonableness. Other circuits are substantially in accord, stating, for example, that affirmative action plans may not "unnecessarily" "trammel" the interests or opportunities of whites. *See Valentine* v. *Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 50 U.S.L.W. 3486, _____ U.S. _____ (1981); *Detroit Police Officers Association* v. *Young*, 608 F.2d 671, 696 (6th Cir.), *cert. denied*, 101 S.Ct. 3079, _____ U.S. _____ (1980); *United States* v. *City of Miami*, 614 F.2d 1322, 1339, *reh. en banc granted*, 625 F.2d 1310 (5th Cir. 1980); *see also United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 (1979).

The orders here meet this test of reasonableness. They were necessary to safeguard the progress toward desegregation painstakingly achieved over the last seven years. Without them, the percentage of blacks would have fallen almost to its level nearly a decade ago, before this suit was brought. Such a result could not be countenanced. *See generally Green* v. *County School Board*, 391 U.S. at 438-39; *Morgan* v. *McDonough*, 540 F.2d 527, 533 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). Nor was the position taken by the district court an extreme one: CBEB, for example, argues that it should have gone much further. The court postponed achievement of the 25 percent goal, rather than ordering a layoff procedure to meet the goal. It chose to forego using the layoffs as a means of achieving greater desegregation, in favor of simply ensuring that they did not threaten the progress already made.[6]

We thus conclude that the district court's orders were a reasonable response to the situation which confronted it, and that, in the circumstances, they do not constitute forbidden racial preferences. In what is to our knowledge the only other case dealing with this precise issue, a district court came to the same conclusion: a preference for black teachers in layoffs and recalls is a reasonable and constitutionally permissible solution to the problem. *See Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732, 750-55 (W.D. Mich. 1980), *appeal pending*. We are not unmindful of the substan-

[6] This discussion also serves to dispose of the issues raised by CBEB's appeals. CBEB essentially contends that the layoffs should not slow progress toward the 25 percent goal. We cannot say that the district court abused its discretion in entering the orders it did. The 25 percent goal, while real, *see* note 5, *supra*, was not to be achieved by hiring preferences, but simply by affirmative recruitment. The proposed layoffs presented the court with difficult decisions involving competing interests. As discussed above, we think the orders entered were reasonable.

tial human costs engendered by these layoffs, but those costs are, for the most part, the product of the layoffs themselves, and not of the court orders, which in themselves required no layoffs at all. We understand, and sincerely regret, the fact that the expectations of certain teachers have been defeated,[7] but the alternative would be to defeat the expectations of the plaintiff class of school children and their parents. The district court struck a reasonable balance between these competing interests, and we therefore see no reason to disturb it.

We turn, then, to the last prong of the *Milliken* test:

> [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. . . . If, however, "school authorities fail in their affirmative obligations . . . judicial authority may be invoked."

Millliken v. *Bradley*, 433 U.S. at 280-81 (citation omitted). This factor cuts in favor of the district court's decision with respect to the teachers, since the district court accepted (with only minor modifications) the Boston School Committee's own proposal for dealing with the situation. This is not a case where a judicial formulation has been imposed upon a resistant and objecting local administrative body. The factor initially weighs against the order in the administrators' case, because the court refused to grant the School Committee's motion to conduct layoffs by seniority. For several reasons,

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[7] We do not accept appellants' argument that the collective bargaining seniority provisions preclude the court from taking the action it did. In the first place, the contract with the teachers provides that the layoff and recall procedure shall be subject to all lawful federal orders. Second, the contracts alone cannot bar a federal court from granting effective relief for constitutional violations. *See Arthur* v. *Nyquist*, 520 F. Supp. at 965, and cases cited therein.

however, this alone does not mandate reversal. First, the order is not particularly intrusive into local affairs; it simply mandates continued compliance with earlier orders, without becoming involved in such local matters as control of the budget, *see infra* p. 14. Second, the School Committee itself has taken no position in this appeal, so it is difficult to accept an argument premised on that body's interest in managing its own affairs. Indeed, the other local authority involved, the State Board of Education, has filed a brief in support of the order. Finally, as *Milliken* itself recognizes, even the interest of local authorities could not preclude a court from remedying constitutional violations. More intrusive measures have been authorized, where necessary, in other aspects of this case. *See Morgan* v. *McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) (South Boston High School receivership).

Appellant BTU raises one final argument, that the district court erred in failing to hold an evidentiary hearing before granting the School Committee's motion. We note at the outset that BTU never requested such a hearing until its motion for reconsideration, which by itself provides a strong reason for rejecting the argument, *see supra* pp. 5-6. In addition, the evidence that BTU wishes to present is, for the most part, either sufficiently known to the district court or irrelevant. The district court was apprised of the fundamental information it required for a decision: the impact that layoffs would have on compliance with court-ordered remedies. The court was certainly aware of the impact that layoffs would have on those laid off. The layoffs themselves were never ordered by the court, whose orders were conditional, *see supra* p. 4. Nor was the court obliged to consider budget reallocation as an alternative to the layoffs, since the School Committee's own motion kept it in substantial compliance with the court orders. Absent noncompliance, the court

would have no justification to intrude upon local matters such as budget decisions. *Compare Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. at 746-50. We thus see no reversible error in the district court's denial of BTU's request for an evidentiary hearing in its motion for reconsideration.

Affirmed.

Adm. Office, U.S. Courts – Addison C. Getchell & Son, Inc.

United States District Court
For the District of Massachusetts

TALLULAH MORGAN ET AL.,)
Plaintiffs,)
vs.) Civil Action No. 72-911-0
JOHN O'BRYANT ET AL.,)
Defendants.)

Before: Hon. W. Arthur Garrity, Jr.,
District Judge.

Court Room No. 5
Federal Building
Boston, Massachusetts
July 9, 1981

Appearances:

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for the plaintiffs.

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proposal and McDonough's proposal, specifically when they talk about tie-breakers, suggest that they don't want to go by evaluations, they were going to go by strict seniority. They were not so concerned for competence themselves.

I am concerned here about the system that is now 46.4 percent black, the teaching population that would be 20 percent, and the administrative staff, namely, those in power, being overwhelmingly white. That, it seems to me, is a symbolism that this Court cannot allow to happen.

Finally, if, as Mr. Simonds suggested, the School Committee filed — went through this vote, well knowing that this Court was the final authority, without any justification, then it was simply an exercise in political machination, then it was simply an exercise in political irresponsibility without justification in terms of this Court's findings, and knowing that this Court would have to take a position to reverse that vote, and under the circumstances, I think that that kind of symbolism, that kind of gesture, is really a little bit too late in the day for this case.

(Applause.)

THE COURT: Well, now, you people who are applauding couldn't have been here over the last seven years. I didn't see the people that are clapping here in the courtroom four, five, six, seven years ago. You can applaud downstairs on the sidewalk, but that doesn't go here. I remember very good presentations in other years without applause. There is just no occasion for it. It is different.

This is not a town meeting, it is a court of law, and I am endeavoring to apply legal principles.

With that preliminary, I will at this point rule on the motion for the modification, which is that the motion is denied, and I will state just four reasons, and, I hope, quickly.

The Court reaffirms what I consider to be the plain meaning of the February 24, 1976, order, as stated by some of the

counsel who spoke, Miss Gertner, Mr. Johnson, and others, and Mr. Bohn. It does not speak in terms of hiring. It speaks in terms of shortages and the elimination of shortages. It is in the context of hiring, but the language in my view needs no clarification beyond what I am giving it right now.

So that it means that there must be retained 20 percent black Category One administrators. That means principals and headmasters.

Secondly — this is in response to Mr. Simonds' specific request — this order does explicitly supersede any contrary or conflicting provisions of any collective bargaining agreement between the School Department and anyone else, especially, of course, in this instance BASAS, that is, the Boston School Administrators and Supervisors. I left the word "Supervisors" off when I mentioned it before.

Finally, and this is just by way of clarification, it is only because of a statement that was made by one of the lawyers that seniority should apply because it is color-blind. Well, I have got to pick up that point very, very briefly.

Anyone who is not aware that the orders in this case and this case is not color-blind misses the whole point to the desegregation case. I have said so often that I couldn't estimate the number of occasions, this is a race case. It is a black parents' and black children's case, with other minority intervening after the liability was over.

Does this Court base orders on color? Absolutely yes. Is it color-blind in its approach? Absolutely not. Must the School Department take color into account in carrying out these orders? Positively yes. Any case dealing with the remediation of racial discrimination is a color case, so all of these cases, not just school cases but any cases based upon racial discrimination, require that things be done, orders be made, steps be taken because of the color of the persons who have been discriminated against in the past.

The fact that seniority may be color-blind is a reason for not using it, not a reason for using it, because it is only color-attentive steps and procedures that are required to undo the effects of past racial discrimination.

Well, those are the reasons for the Court's denial of the motion.

And I know you have overstayed, and you could speak if you wanted at this point, but you can go otherwise. I have other matters to turn to now.

MR. SIMMONDS: Thank you, your Honor.

THE COURT: Right. I wanted to speak and give the order before Mr. Simonds left, because he is the one who will be communicating with his clients.

I will turn in a moment, if anyone wishes, to these motions for injunctions and other things. I am aware that I did not make any order explicitly in respect to the headmasters, and I will hear you further on that and these other motions in a moment. What I wish to rule upon now, in part, at least, is the motions that have been pending for two weeks.

This is the motion of the Concerned Black Educators that was filed on June 4, 1981, to order that the percentage of black faculty be increased to 25 percent, and the motion filed by plaintiffs to increase the percentage of black faculty to 22 percent. That was filed May 26, 1981.

The rulings — and then I will elaborate somewhat on those motions — are that the motion of the Concerned Black Educators is denied, and the motion of the plaintiffs to raise the percentage to 22 percent is retained under advisement for the time being. However, the Court's order on plaintiffs' motion, if it requires an increase of the black faculty percentage to 22 percent, which would match the current percentage of the black percentage of the total population of the city of Boston, will not apply to the 1981-82 school year.

What I am saying is — and I will elaborate on this in a moment — I do not deny the plaintiffs' motion, but allowance of it, if it is allowed, will not apply to the next school year. What that is designed to do is to enable the School Department to go forward with its faculty assignments without doubt as to whether the plaintiffs' motion would be granted with respect to the 1981-82 school year.

Now, the reason for denial of the Concerned Black Educators' motion is that this Court's outstanding orders simply cannot, in my view, be construed fairly as requiring that an increase in black faculty to 25 percent be achieved through reductions in force, as the Concerned Black Educators contend. The 25 percent is an affirmative action goal.

The court may, as I have indicated with respect to the plaintiffs' motion, enter further orders in this area, but the motion of the Concerned Black Educators is simply not supported by the orders or the history or the law as I understand it that is applicable to this case.

Turning now to the motion to increase the percentage to at least 22 percent, the reason the Court cannot rule on this motion at this time is that information that I requested that the school defendants supply to the court experts a couple of weeks ago has not yet been received in final form. Just — was it yesterday, Dr. Scott, or the day before?

DR. SCOTT: The day before.

THE COURT: The day before yesterday, Dr. Scott received a printout, and it took some time in preparation, apparently, because I know from more or less constant communication with him that he had asked for this, and there were efforts being made to put together the information that would be needed. Now he is going to get supplementary information, the nature of which has already been communicated to the persons in the School Department with whom he has been conferring, within the next week or so.

Here is the Court's concern: that is, that the order that the 19.1, or whatever, that 19 point percentage of black faculty be retained and maintained for the 1981-82 school year may encounter obstacles in implementation that I cannot rule on without any assurance of confidence, or perhaps I should say without sufficient assurance of confidence, to permit me to make a ruling at this time.

There has been clustering of black faculty and clustering by category of white faculty, and administrators too, but the extent of that I have been endeavoring to determine, and I have only just today got the first set of figures, and they are not really adequate.

It may be that the Court's order dated June 2, 1981, adopting the school defendants' plan for maintaining a 19.09 black faculty, may have to be supplemented in some minor respects to assure that it can actually be carried out.

It is not as easy to implement that maintenance order as might appear on the surface, and it is that problem that Drs. Dentler and Scott are looking into at my request, and that is an additional reason why I have retained under advisement the plaintiffs' motion to increase the percentage to 22 percent.

One other way of putting it is this: If it should appear that the only way of achieving broader desegregation in the faculty of the Boston public schools is to increase the minimum percentage from 20 percent to 22 percent, I want to be able to give consideration to that, but I have already stated to you that any orders along those lines would affect the 1982-83 school year and not the school year that would begin in September, so you could go forward with planning on that basis.

That may not be quite as clear as I would hope it to be, but it is by way of explanation of why I ruled on the Black Educators' motion, and it is denied, but the other one is still under advisement.

Now I will hear from other counsel who have filed motions that I have not addressed directly yet today. I wanted to give priority to the school defendants' motion, but this is not to say that I do not entertain plaintiffs' motion for a permanent injunction and for other relief, or El Comite's motion, or, for that matter, the Concerned Black Educators' motion to the extent that it goes beyond what I have already ruled upon.

To some extent, those three motions have been mooted by the Court's ruling on the School Committee's motion for modification, and by denying it. On the other hand, I want to hear Mr. Johnson with respect to his motion, if he wishes, at this time.

I do not think of motions directed to Category Two administrators to be ripe for hearing at this time. The reason I asked for hearing today the Category One administrators motion — and what that refers to is principals and headmasters; Category Two means administrators other than principals and headmasters — but the reason I did that was because of the votes of the School Committee.

There are no votes of the School Committee having to do with Category Two, so have that in mind, please, when you speak to this motion. Do you still wish to be heard on it at this time, or perhaps after other parties have filed responses? or whatever you wish.

MR. JOHNSON: Your Honor, I am just standing to speak

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-911-G

TALLULAH MORGAN ET AL.,
Plaintiffs,
v.
JOHN J. KERRIGAN ET AL,
Defendants.

ORDER FOR DESEGREGATION OF ADMINISTRATIVE STAFF

February 24, 1976

GARRITY, J. Upon consideration of the city defendants'[1] Plan for Desegregation of School Administrators filed September 27, 1974 and Further Information Concerning Administrators filed January 13, 1975 and Information on Administrators filed January 12, 1976 pursuant to the court's order entered January 8, 1976, and counter-proposals and legal memoranda filed by other parties, and after several hearings, it is ORDERED that the city defendants' plan, consisting of a proposal dated February 5, 1973 and approved by the school committee on April 2, 1973 and nine amendments[2] voted on December 27, 1973 (appearing in Administrative Circular No. 65 dated January 8, 1974), as further amended by the provisions of this order which follow, be adopted as an order of the court.

[1] "City defendants" refers herein to the school committee members and superintendent and not to the defendant Mayor.

[2] Defendants' plan was also amended administratively by disuse of its provisions for an interim promotional rating procedure (p. 14) and interim screening committees (pp. 21-22); and by school commitee votes on July 9, 1975 regarding required postgraduate study in the fields of educational administration and supervision and on January 22, 1976 regarding composition of community screening committees.

1. *Applicability.*

A. The plan shall apply to all administrative positions listed in the school committee's filings on January 13, 1975 and January 12, 1976, and also to administrative positions in the superintendent's office, e.g., educational, informational and fiscal specialists, and in community district offices, e.g., staff development, reading specialist and 766 coordinator positions. The plan shall not apply to clerical or secretarial staff. The plan shall apply to the position of attendance supervisor only if appointments to that position are resumed.[3]

B. Where the plan in its current form makes no provision for appointments to administrative positions to which it shall apply, e.g., positions in the superintendent's office and community district offices and guidance and pupil adjustment counselors, the city defendants shall forthwith address and propose promotional procedures and eligibility requirements with regard to such positions and shall file a plan supplement containing them on or before March 23, 1976, as to which other parties may file comments on or before April 2, 1976.

C. Provisions of the plan herein ordered supersede any inconsistent provisions in the plan proposed by the city defendants, e.g., the reference to positions of pupil adjustment counselor and guidance counselor at p. 26.

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[3] Vacancies in the position of attendance supervisor, formerly called truant officer, have not been filled in recent years. Apparently the position is being eliminated by attrition and replaced by the position of pupil adjustment counselor which has been listed in defendants' filings. See Special Report No. 26 of the Boston Municipal Research Bureau dated January 14, 1974 appended as Appendix A to defendant Mayor's comments filed December 11, 1975.

2. *Eligibility.*

A. Provisions regarding qualifying examinations and various exemptions therefrom are stricken, provided that such provisions may be reinstated if they use or incorporate by reference only examinations which have been validated by the Equal Employment Opportunity Commission pursuant to guidelines prescribed by 29 Code of Federal Regulations §§ 1607.2-8.

B. Test scores on unvalidated Educational Testing Service examinations or other unvalidated examinations shall not be considered by screening committees or appointing authorities and shall not be included in materials compiled by the Board of Examiners or other agency or person making initial determinations of eligibility, which shall be based upon objective criteria.

C. If a candidate has served in a similar position outside Massachusetts, state certification shall not be required prior to appointment, provided that the candidate is fully qualified for provisional Massachusetts certification for the appropriate administrative level pursuant to Mass. G.L. c. 71, § 38G.[4]

D. Until the 20% goals hereinafter established shall have been attained, requirements of post-master's study, i.e., post-graduate study beyond that necessary for a master's degree, shall not exceed requirements in effect before September 20, 1972 when all existing promotional rating lists were terminated, e.g., nine semester hours of additional graduate credit in administration or supervision courses for head-

[4] Cf. amendment 9 in Administrative Circular No. 65 dated January 8, 1974 (attachment "C" of defendants' plan).

masters and principals and six for assistant headmasters and principals.[5]

3. *Promotional Rating Procedures.*

A. Screening procedures appearing in the city defendants' plan, as supplemented on or before March 23, 1976 and modified by court order, shall apply to all permanent appointments except by transfers of permanent appointees pursuant to collective bargaining agreements; i.e., inapplicability to certain acting incumbents of the modified racial ratio hereinafter provided shall not affect the applicability of screening procedures.

B. Adverse determinations of eligibility by the Board of Examiners (or other agency or person making initial determinations) may be appealed by an applicant within two days after receiving notice of the adverse determination; appeals shall be in writing addressed to the associate superintendent for personnel who shall review the file and decide the appeal with or without a hearing within five days after receiving the written appeal.

4. *Community Screening Committee.*

A. Pairs of assistant principals or assistant headmasters and teachers designated at page 19 for membership on a community screening committee shall be one white and one black.

B. Each committee shall include two other minority members selected by the Community District Superintendent, one of whom shall be a school department employee.

C. Community screening commitee membership shall include four parents of students enrolled in the particular

[5] Additional hours of graduate study may of course be favorably considered in screening and rating applicants for administrative positions.

school at the time of the committee's functioning, of whom three — including at least one white and one black and preferably one other-minority — shall be selected by the school's Racial Ethnic Parents' Council (REPC), and the fourth shall be selected by any Home and School Association (HASA) for the particular school or, in the absence of an HASA for the particular school, by any other active parents' association connected with the particular school and existing as of the date of this order or, in the absence of both, by the school's REPC.

D. When a vacancy exists in a high school, membership shall include two or more students selected by the school's Racial Ethnic Students' Council (RESC), as follows: one white student and one black and one from any racial ethnic group entitled to full membership on the RESC under previous orders of the court.

E. References at page 19 and elsewhere in the plan to the School Advisory Council and Student Council are stricken and REPC and RESC respectively shall replace them where they appear.

5. *Central Screening Committee.*

A. The title "Co-Professional Screening Committee" shall be changed to Central Screening Committee.

B. Pairs of persons designated at p. 20 for membership on a central screening committee shall be one black and one white.

C. Central screening committee membership shall be enlarged so as to include on each such committee (i) one other-minority school employee and (ii) three parents of students enrolled in public schools of Boston at the time of the committee's functioning — one black, one white and one other-minority — who are members of the Citywide Parents' Advisory Council (CPAC) or Community District Advisory Councils (CDACs), to be selected by the Superintendent in consultation with the appropriate Associate Superintendent.

6. *Categories and Modified Racial Ratio.*

A. Initially, for purposes of this order, administrative positions shall be divided into two categories: first, headmasters and principals;[6] and second, all other administrative positions. As long as the racial composition of total administrators, i.e., both permanent and acting, in either category is less than 20% black, a shortage of black administrators shall be deemed to exist in that category and the modified one-to-one racial ratio herein provided for appointments, whether permanent or acting, in that category shall apply and be implemented until the shortage of black administrators shall have been eliminated. After shortages in both categories have been eliminated, a subcategory within the second category shall be recognized for purposes of this order, viz., a deferred third category comprising only administrative positions covered by sections IV and V of defendants' plan (director, associate director, assistant director, supervisor, division head and coordinator director) and any newly established equivalent positions; and if the racial composition of total administrators in that subcategory is less than 20%, a shortage of black administrators shall be deemed to exist in that subcategory and the modified one-to-one racial ratio herein provided for appointments to positions in the second category shall similarly apply and be implemented until such shortage disappears.

---

[6] "Principal" means the person in charge of any elementary or middle school facility. Our use of the generic term "building administrator", which does not appear in Mass. G.L. c. 71, § 38C, but which we sometimes previously used to describe persons in charge of elementary schools in former multi-school elementary districts, which were abolished by previous orders of the court, and which has been used in some of the parties' filings, is discontinued.

B. If a shortage of black administrators exists in a category (including the deferred third category), vacancies as herein defined shall be filled in that category on the basis of one black administrator being appointed for every white administrator appointed, i.e., white and black appointments, whether permanent or acting, must alternate, and the number of white administrators henceforth given permanent appointments to vacancies as herein defined shall not at any time exceed the number of black administrators given such appointments. A vacancy in the first category shall exist when a headmastership or principalship (i) is newly established, or (ii) becomes unoccupied due to retirement, disability, reassignment, transfer or other occasion, or (iii) is occupied as of the date of this order by an acting appointee and filled, except by transfer of a permanent appointee, by the appointment of a person other than such incumbent,[7] i.e., a position now held by an acting appointee shall be counted as a vacancy unless filled permanently by the incumbent or by transfer of a permanent appointee. Similarly, a vacancy in the second category and deferred third category shall exist when an administrative position (i) is newly established, or (ii) becomes unoccupied due to retirement, disability, reassignment, transfer or other occasion, or (iii) is occupied currently by an acting appointee who was appointed to the position after February 23, 1973, or (iv) is occupied currently by an acting appointee appointed before February 23, 1973 and filled by the appointment of a person other than such incumbent, i.e., a position held by an acting appointee shall be counted as a vacancy unless filled permanently by the incumbent who has occupied it on an acting basis for three years or longer.

[7] Thus it will not be known whether this (iii) type of vacancy exists until after a permanent appointment pursuant to regular screening and appointive procedures has been made to a first category position now occupied by an acting headmaster or principal.

C. The provision in the previous paragraph that "white and black appointments, whether permanent or acting, must alternate" shall be suspended with respect to a category if there is no black candidate eligible for appointment to a vacancy of any kind existing in that category,[8] or if the only black candidates eligible for appointment to vacancies of any kind in that category have been found by the superintendent or the school committee to be unqualified for stated, particular reasons and written notice of any such finding has been given to counsel for all parties, in which event a vacancy in that category may be filled by an acting appointment without regard to race; provided that the one-to-one balance shall be restored as soon as possible by the unpaired appointment of an equal number of eligible, qualified black candidates to vacancies of any kind in that category.[9]

7. *Transfer Rights.*

Nothing herein shall limit the transfer rights of permanent administrators under the defendants' plan, which provides, see amendment 3 in Administrative Circular No. 65 dated January 8, 1974, that "rights of transfer as provided under existing contracts[10] shall be retained, subject to approval of

[8] This would appear to be an unlikely development, because the number of first category vacancies will be relatively small and the second category of administrative positions is broad, including not only highly specialized posts but also positions, e.g., guidance counselors, for which there is probably an oversupply of eligible black candidates.

[9] An analogous "catch-up" provision regarding provisional teachers is discussed in *Morgan* v. *Kerrigan*, 1 Cir., Jan. 26, 1976, slip op. at 6-7.

[10] Article VI, para. 3 at p. 9 of the agreement between the school committee and the Boston Association of School Administrators and Supervisors (BASAS) dated February 14, 1974, which we understand has been extended and is still in effect, provides that

the Superintendent and the Boston School Committee." Positions filled by such transfers shall be excluded in applying and ascertaining compliance with the modified one-to-one racial ratio herein ordered.

8. *Timetable.*

All headmasterships and principalships shall be filled by permanent appointees, i.e., pursuant to relevant screening and appointive procedures, on or before August 1, 1976.[11] Second category administrative positions and any newly established equivalent positions[12] shall be filled by permanent appointees as soon as administratively feasible, except where such positions are temporary or no candidates apply who are qualified for permanent appointment.

9. *Special Orders.*

A. On or before August 1, 1976 the city defendants shall appoint black administrators to second category administrative positions in high schools, so that every high school shall have at least one black administrator and every high school with ten or more administrators shall have at least two black administrators.

"any B.A.S.A.S. member whose position is terminated or changed for any reason beyond that member's control shall have priority of transfer over new appointees and shall be allowed a second transfer without waiting for a two-year period to elapse." If BASAS members have any different or additional "rights of transfer as provided under existing contracts", BASAS counsel in these proceedings shall file forthwith and serve on other parties copies of such contractual provisions.

[11] By so providing, we do not intend to bind the city defendants to salary arrangements currently in effect. See *Morgan* v. *Kerrigan*, 1 Cir., Jan. 14, 1976, slip op. at 49.

[12] Nothing herein prohibits the elimination of any second category position for educational, financial or other reasons.

B. The appointment of other-minority administrators shall also proceed on an accelerated basis[13]; and such appointments shall be excluded in applying and ascertaining compliance with the modified one-to-one racial ratio herein ordered.

10. *Desegregating Administrators.*

Generally, black administrators shall be appointed to positions throughout the school system. Except by leave of court on a showing of educational or administrative necessity, by the time shortages of black administrators have been eliminated, the percentage of black administrators in any one kind of administrative position, whether in central administration or in school facilities, and at each grade level in each of the nine school districts, shall not be less than one-half or more than twice the percentage of black administrators employed by the school department, e.g., assuming 20% of total administrators are black, the percentage of black supervisors, or black assistant headmasters in a particular community district, shall not be less than 10% or more than 40%.

11. *Filing of Suggested Criteria.*

The city defendants shall file and serve on or before March 23, 1976, as to which other parties may file comments on or before April 2, 1976, lists of suggested criteria to be considered by screening committees in evaluating candidates

[13] The record does not support the establishment of a specific goal for the appointment of other-minority administrators. However, this finding is without prejudice to the submission of further evidence by El Comite on behalf of other-minority students, who are a growing component of the student body.

and to be considered by the board of associate superintendents when interviewing and ranking finalists; and copies of written materials designed to assist the screening committees and board in evaluating candidates. See parts II A and B of city defendants' report filed November 12, 1974.

12. *Recruiting.*

A. The Program for Recruitment of Black Teachers and Administrators dated September 11, 1975 and approved by the city defendants on January 19, 1976 is adopted as part of this order, with the following modification: black and other-minority candidates for administrative positions who reside outside New England and who are invited by the coordinator of minority recruitment to come to Boston for screening committee or other interviews shall, at the discretion of the coordinator, be reimbursed for reasonably necessary travel, food and lodging expenses which, if so incurred, shall be paid by the city defendants, provided that any such payments fall within the programmed budget totalling $130,336.79. At the discretion of the associate superintendent for personnel, such payments may come from amounts budgeted for other items, including the amount budgeted for the position of examiner which, at said associate superintendent's discretion, may remain unoccupied or filled at a lower salary.

B. It is further ordered that the city defendants formulate and approve similar future programs for recruitment, until the percentage of black administrators in the school system shall have increased to 25% and that of other-minority administrators shall have increased substantially.

13. *Reporting.*

A. In addition to the annual report on administrators to be filed on or before July 15 pursuant to paragraph 5 on page 97

of the student desegregation plan ordered May 10, 1975, the city defendants shall file and serve on or before January 15 and March 15 of each year and on October 15, 1976 a report on the numbers of white, black and other-minority permanent and acting administrators then employed, similar in form and content to the report of the associate superintendent for personnel filed on January 12, 1976, except that such reports shall also (i) list unoccupied administrative positions and (ii) cover positions in or connected with the superintendent's office and community district offices.

B. Simultaneously with or as part of the semi-annual reports on recruiting of black faculty required by paragraph 4 at page 9 of the court's order on faculty recruiting dated January 28, 1975, the city defendants shall report on activities undertaken by them in recruiting additional black and other-minority applicants for administrative positions, until 25% of the administrators in the Boston public school system are black.[14]

United States District Judge

[14] A memorandum of decision regarding this order will be filed in the near future.

The Layoff Provisions of the BASAS Collective Bargaining Agreement.

ARTICLE XII.

Layoff

Section 1. Prior to laying off bargaining unit members, the School Committee shall notify BASAS in writing that it has such a proposed layoff under consideration. Upon receipt of any such notification BASAS shall meet with the School Committee to discuss whether the proposed layoff can be avoided, and if not, whether the proposed layoff can be effectuated through normal attrition.

Section 2. If the Committee decides after consultation with BASAS to lay off bargaining unit members, such layoffs shall be made consistent with this Agreement, Massachusetts state law, and the lawful orders of the federal court(s).

Section 3. Definitions.

a. *Seniority.* An administrator's seniority date in any given bargaining unit position (Building administrator in 1975-76 is recognized as principal's position) shall be established as of the date the administrator first served in such position on a permanent basis or on an acting basis if the acting service was continuous with the permanent appointment to such position. Seniority shall continue to accrue in a lower rated position while a member serves in a higher rated position.

The parties agree that negotiations concerning the inclusion of tenured acting administrators in this definition shall be reopened within thirty (30) days after request for same by BASAS if the Federal Court clarifies its present orders to permit a broader interpretation of rights for tenured acting administrators.

Time spent in authorized leave of absence granted for any reasons prior to September 1, 1980 will continue to count as seniority in BASAS. Paid leave of absence granted on or after September 1, 1980, including leave covered by workmen's compensation, will continue to count as seniority in the BASAS unit. Unpaid leave of absence effective on or after September 1, 1981 for any reason other than for union business under V will not count as seniority in the BASAS unit.

Any persons who serve outside of the bargaining unit in higher level positions shall accrue seniority for all service in BASAS and the higher level position.

b. *Tenured Administrator.* An administrator who has attained tenure pursuant to Chapter 71, Section 42 A.

c. *Categories:* For purpose of this Article the following shall be considered categories: Listed on separate sheet.

Section 4. Layoff Procedures.

a. This layoff procedure will not apply to non-tenured members or to BASAS members who have not been permanently appointed to a BASAS position for three (3) consecutive school years.

b. No tenured member shall be laid off hereunder if there is a non-tenured member or a member with no seniority in the affected job category.

c. Reduction in force of tenured members will be by inverse order of seniority in the affected job category.

d. Any person who loses his position due to a layoff shall be transferred to his/her previous bargaining unit position, provided, however, the bargaining unit member shall not be permitted to displace a member with greater seniority or a tenured member if the affected individual does not hold tenure in the previous bargaining unit position. If no such

position exists he shall be transferred to a BTU position for which he/she is qualified if he/she meets the requirements of 4 f. This provision neither decreases nor increases seniority rights under the BTU Agreement.

When a member exercises his rights pursuant to this Article and displaces a more junior member, the Superintendent or his designee retains the right to assign the individual to the specific position within the affected job category.

e. A member who holds seniority in only one BASAS position in central or district administration and who has twenty (20) or more years professional service in the Boston Public Schools may, subject to the federal court orders on permament positions, be assigned to a BASAS vacancy if the Superintendent determines that the member is qualified to fill that position.

f. A member who has prior teaching experience in the Boston Public Schools may exercise his right to return to the teachers' bargaining unit. Once placed in the teachers' bargaining unit said member shall be deemed to hold seniority for all service in the Boston School Department. A person who becomes a member of the bargaining unit as a result of a permanent appointment to a BASAS position on or after September 1, 1980, will not accrue seniority within the teachers' bargaining unit for time spent in the BASAS position.

g. A member who bumps a more junior member in the same job category waives any right to contest the reassignment in state or federal court and agrees that said reassignment does not constitute a demotion within the meaning of Chapter 71, Section 42 A.

h. Except in emergency situations layoffs will be effective as of the first day of any professional work year. Administrators to be laid off shall be notified in writing by the April 15th preceding the effective date of the layoff. In

emergency situations, layoffs will be effective sixty (60) calendar days following the written notice of the layoff.

i. A member who pursuant to this Article accepts a lower ranked position, accepts said position at the salary for the lower position provided, however, that the salary of a principal or headmaster who is assigned to a smaller school as a principal or headmaster shall not be reduced.

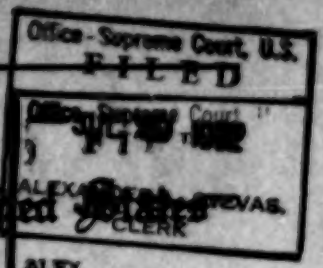
Section 5. Recall.

a. Members on recall will be given first preference in filling permanent vacancies in the category from which the affected members were laid off on the basis of seniority.

b. Recall rights shall be retained for two (2) full school years from the effective date of layoff unless sooner terminated by rejection of two (2) recall offers or failure to report for work within fifteen (15) calendar days after receipt of such recall notice.

Section 6. This layoff and recall procedure is subject to all applicable state and federal laws and lawful orders pursuant thereto.

Nos. 81-2124 & 81-2306



In The

Supreme Court of the United States

October Term, 1981

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,

Petitioner,

vs.

TALLULAH MORGAN, et al.,

Respondents.

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,

Petitioner,

vs.

BOSTON SCHOOL COMMITTEE, et al.,

Respondents.

In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL. AND EL COMITE DE PADRES

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In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR TALLULAH MORGAN, ET AL. AND EL COMITE DE PADRES

The plaintiffs-respondents Tallulah Morgan, et al., black parents and their children attending the Boston Public Schools,

and El Comite de Padres, representing Hispanic parent intervenors, oppose the petitions for certiorari being brought by Local 66, Boston Teachers Union (hereafter BTU), AFL-CIO and the Boston Association of School Administrators and Supervisors, AFL-CIO (hereafter BASAS) to review a February 17, 1982 judgment of the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

This is a school desegregation case brought in 1972 by black parents and their children enrolled in the Boston Public Schools. Respondents (hereinafter plaintiffs) alleged that the "city defendants have intentionally brought about and maintained racial segregation in the Boston Public Schools" and that various school department practices, including the discrimination in the hiring, assignment and promotion of black faculty and administrators, "deny black children their constitutional right to equality of educational opportunity under the Fourteenth Amendment". *Morgan v. Hennigan,* 379 F. Supp. 410, 461 (D. Mass. 1974), *aff'd sub. nom. Morgan v. Kerrigan,* 509 F. 2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

In 1974, the District Court ruled that "[t]he defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and have intentionally brought about and maintained a dual school system". (379 F. Supp. at 482.) With regard to staffing, the court found specifically that the "defendants have violated the constitutional right of public school students to have the school system operated free of racial discrimination in the recruiting, employment and promotion of teachers and staff". (379 F. Supp. at 456.)[1] The court then ordered that the defendants "shall eliminate every form of racial segregation in the public schools

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1. The Court of Appeals in affirming the District Court's findings held that, "The discriminatory hiring practices, segregative assignment and transfer policies, and the promotion system which perpetuated in administrative positions the effects of discriminatory hiring, have further combined to buttress the segregated nature of the school system. Their cumulative effect was to isolate black students, black teachers and black administrators in a limited number of schools, thereby denying to those students the equal educational opportunity to which they are constitutionally entitled." *Morgan, supra,* 509 F. 2d at 597-98.

of Boston, including all consequences and vestiges of segregation previously practiced by the defendants". (*Id.* at 484.)

To remedy the "consequence" of the nonhiring of black faculty, caused by the discriminatory hiring practices of the school defendants, the District Court ordered in part that the school system hire "black and white teachers . . . on a one-for-one basis until the percentage of black faculty in the school reaches 20%". *Morgan v. Kerrigan,* 388 F. Supp. 581, 583 (D. Mass. 1975), *aff'd,* 530 F. 2d 431 (1st Cir. 1976), *cert. denied,* 426 U.S. 935 (1976). Additionally, the school defendants were ordered to continue the affirmative recruitment of blacks until they constituted 25% of the faculty. (*Morgan, supra,* 388 F. Supp. at 584.)

The BTU, a petitioner in the present action, took an appeal from these orders of the District Court, but the Court of Appeals rejected the claim that the remedy is "an unlawful racial preference". (*Morgan, supra,* 530 F. 2d at 431.) The court declared:

> "This argument fundamentally misapprehends the nature of this case. The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. The district court's examination of the School Committee's recruitment, hiring, transfer and promotion policies was undertaken to determine whether those policies violated the rights of black Boston public school children. It is the rights of those children that the order in issue is intended to protect. [cite omitted] In its effort to eliminate segregation and its effects 'root and branch', *Green v. County School Board,* 391 U.S. 430, 438 (1968), the court's equitable power to fashion a remedy is both broad and flexible. *Swann v. Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1, 15 (1971)." 530 F. 2d at 432.

To remedy the effects of the discrimination found in the failure to hire and promote black administrators, the District Court on February 24, 1976, entered its order for desegregation of Administrative Staff (AA23).[2] This order, like the faculty orders required the one-for-one appointment of black and white administrators, until the "shortage" (less than 20%) of black administrators within the school system was eliminated. Thereafter, one-for-one appointments were to be made to certain positions (Category III) that continue to have a "shortage", and recruitment was to continue until blacks constituted 25% of the administrators in the school system (AA28, 33).

Plaintiffs, in 1978, sought further relief to bring about the desegregation of the faculty, as the school defendants had violated the court's outstanding orders. On July 5, 1978, the court amended its faculty hiring orders to require that there be an annual increase of 1½% black teachers until the shortage of black teachers is eliminated (A6).

In the fall of 1980, BTU and BASAS entered into collective bargaining agreements with the school defendants, which included provisions for the layoff of teachers and administrators respectively (AA35; TA31). These provisions were made "subject to federal laws and lawful orders issued pursuant thereto". (AA38; TA35). Such orders included the July 5, 1978 memorandum and further orders on faculty recruiting and hiring and the February 24, 1976

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2. The various appendices shall be cited as follows: "A" for the appendix which accompanies this response; "AA" for the appendix filed with the administrators' (BASAS) petition and "TA" for the appendix filed with the teachers' (BTU) petition.

order for desegregation of administrative staff, discussed above, with which full compliance had yet to be achieved.

In the spring of 1981, the school defendants sought to modify these orders calling for the elimination of the "shortage" of black teachers and administrators in the Boston Public Schools. As to teachers, the school defendants sought to maintain the prevailing percentage of blacks, thereby deferring compliance with the court's goal of 20% (A11). In contrast, as to administrators, the school defendants sought to layoff blacks, thereby reestablishing a shortage of black headmasters and principals (A14).

On June 2, 1981, the District Court allowed, with minor modification, the school defendants' motion which called for the proportional sharing of the burden of the reduction in force, so that the desegregation process of black teachers would be maintained at the then current level (19.09%), throughout any layoffs (TA18).

But it rejected the school department's request to reduce the percentage of black headmasters and principals from 20.53 to 13.8% (AA17-19).

The Boston Teachers Union and the Boston Association of School Administrators and Supervisors took appeals from these two orders on behalf of their white members. The school defendants have taken no appeals from these orders; indeed the school department opposes the petition for certiorari being sought by the Boston Teachers Union.

On February 17, 1982, the Court of Appeals for the First Circuit upheld the District Court's orders of June 2, 1981 and July 9, 1981, which maintained the desegretion of the faculty and staff of the Boston Public Schools. *Morgan v. O'Bryant*, 671 F. 2d 23 (1st Cir. 1982).

REASONS FOR DENYING THE WRIT

I.

The District Court's orders for the desegregation of the faculty and administration of the Boston school system were proper.

The District Court properly ordered[3] the desegregation of the faculty and administration within the Boston Public Schools, given its finding of discriminatory hiring practices by the school defendants, which operated to deny black students an equal educational opportunity. (*Morgan, supra,* 379 F. Supp. at 461.)[4]

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3. The primary orders setting out the duty of the school defendants to desegregate the faculty and administration are: Memorandum and Orders on Faculty Recruiting and Hiring, January 28, 1975 [*Morgan, supra,* 388 F. Supp. 581 (1975)]; the Order for Desegregation of Administrative Staff, February 24, 1976 (AA23); and the Memorandum and Further Orders on Faculty Recruiting and Hiring, July 5, 1979 (A5). The memorandum and orders on faculty recruiting and hiring has been upheld in an appeal taken by the BTU; certiorari was denied. No appeal was taken from the other orders.

4. The use of race-conscious remedies for racial discrimination is in accordance with recent decisions of this Court. *See, e.g., Fullilove v. Klutznick,* 448 U.S. 448 (1980); *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). Also, hiring goals have been permitted to eliminate the effects of past discrimination. *Associated General Contractors v. Altschuler,* 490 F. 2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Boston Chapter of the N.A.A.C.P., Inc. v. Beecher,* 504 F. 2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Morrow v. Crisler,* 491 F. 2d 1053 (5th Cir. 1974) (*en banc*) *cert. denied,* 419 U.S. 895 (1975). And it was proper, on the facts before the District Court (as borne out by subsequent experience) for it to find that but for the unlawful discrimination practiced by the school defendants. The percentage of blacks employed as teachers would reflect the percentage of blacks in the local population. (*Morgan, supra,* 388 F. Supp. at 583). As this Court has observed, "(a)bsent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work-force more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 n. 20 (1977).

As this Court has ruled, a district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past . . . ." *Green v. County School Board,* 391 U.S. 430, 438 n. 4 (1968), *quoting Louisiana v. United States,* 380 U.S. 145, 154 (1965).

II.

The District Court orders of June 2, 1981 were proper.

The June 2, 1981 orders of the District Court, which modify memorandum and further orders on faculty recruiting and hiring, satisfies the controlling equitable principles enumerated by this Court for eliminating *de jure* segregation. *Milliken v. Bradley,* 433 U.S. 267, 280 (1977).

In the first instance, the orders flowed from the school defendants' unconstitutional hiring practices (*Morgan, supra,* 379 F. Supp. at 463), as well as, the denial of an equal educational opportunity for black students, due to a segregated work force. *Morgan, supra,* 379 F. Supp. at 461.

Secondly, the orders were remedial in that their purpose was to effectuate compliance with the teacher desegregation orders, in spite of layoffs, thereby continuing "make whole" relief for plaintiffs. *Milliken, supra* at 281-82; *Brown v. Neeb,* 644 F. 2d 551, 563-64 (6th Cir. 1981). By maintaining black and other minority teachers in proportionate percentages, the District Court was insuring a plan that "promises realistically to work *now*". *Green, supra,* at 439. Compliance with these orders would operate to restore plaintiffs in two respects: first, by achieving the hiring goal, the shortage of black teachers caused by discrimination would

be eliminated; and secondly, the equal educational opportunity for black students would be enhanced.[5]

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5. The desegregation of the personnel is integral to the desegregation of the entire school system. As this Court has noted, "(F)aculty and staff desegregation (is) . . . a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Board of Education*, 395 U.S. 225, 231-32 (1969). *See also, Milliken v. Bradley, supra*, 433 U.S. at 282-83; *Oliver v. Kalamazoo Board of Education*, 368 F. Supp. 143, 176-77, 180 (W.D. Mich. 1973), *affirmed*, 508 F. 2d 178, 185 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Arthur v. Nyquist*, 415 F. Supp. 904, 943-48 (W.D.N.Y. 1976), *affirmed in pertinent part*, 573 F. 2d 134, 145 (2d Cir. 1978), *cert. denied*, 439 U.S. 860 (1978).

The positive effect of faculty desegregation on student desegregation has been recognized by several studies and has been incorporated in our federal policy. For example, a 1970 report of the Boston Public Schools recommends:

> ". . . Black representation at all levels in the Boston School Department, [is] a goal necessary to provide role models for Black children; . . . to foster greater sensitivity in the schools to the needs and aspirations of all the citizens of Boston; . . . to achieve an excellence and sophistication in the educational system which a great city deserves and which only true diversity of students and staff can accomplish." - *Organizing an Urban School System for Diversity: A Report on the Boston Public School Department*, Joseph M. Cronin, October 1970, pp. 170-71.

Also, the U.S. Senate Select Committee on Equal Educational Opportunity and the U.S. Commission on Civil Rights have reached similar conclusions, for as they have reported:

> "To encourage the development of supportive classroom environment, we recommend that implementation of plans for school integration be accompanied by: First, integration of faculty and staff. . ." - *Toward Equal Educational*

(Cont'd)

The third factor for judging the appropriateness of the District Court's orders, *i.e.*, "(T)he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs consistent with the Constitution," (*Milliken, supra* at 280-81), is also met in the instant case. The decree which the District Court entered on June 2, 1981 is in most parts the plan urged by the school defendants (A12); and supported by plaintiffs.

III.

The District Court's orders of July 9, 1981 were proper.

The July 9, 1981 orders were proper, as they denied the school defendants' motion for modification of administrators desegregation orders (A14), thereby continuing in effect the outstanding orders of the District Court.

Clearly, there is no issue that the orders were related to a violation found by the District Court, the discriminatory employment practices of the school defendants.

Also, as in the case of the teachers (*see* discussion at page 8), the District Court's interpretation of the outstanding order

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(Cont'd)

Opportunity, Report No. 92-000, 92nd Congress, 2d Session, pp. 270-71.

"Adequate minority representation on the school staff is critical to integrated education. Just as student exposure to students of other races and ethnic groups helps develop racial understanding, tolerance, and appreciation, so also does the presence of a multiracial and multiethnic staff." *Fulfilling the Letter and Spirit of the Law, Desegregation of the Nation's Public Schools*, August 1976, p. i.

for the desegregation of administrative staff to require the maintenance of the desegregation progress which had been achieved, was for the dual remedial goals of employing black administrators to overcome a particular violation and of providing an equal educational opportunity to black students. (*See* n. 4, *supra.*)

The only question is whether the District Court was bound to accept the school defendants' proposal to drastically reduce the percentage of black principals and headmasters from 20.53 to 13.8%. While the District Court is expected to "take into account the interest" of the local school officials, it must do so consistent with its duty to determine whether the officials are acting in "good faith" [*Brown v. Board of Education,* 349 U.S. 294, 299 (1955)], and "whether (their plan) hinders or furthers the process of school desegregation". *Wright v. Council of City of Emporia,* 407 U.S. 451, 460 (1972).

That the school defendants were not acting in good faith is evident by their recognition of their affirmative duty to maintain the desegregation of teachers, as contrasted to their abandonment of this position when it came to administrators, even though the condition to be remedied flowed from the same violation. The District Court recognized that the allowance of the school department's motion would not only have "hindered", but, in fact, dismantle the desegregation achieved by hiring black and other minority principals and headmasters.

IV.

The orders of June 2, 1981 and July 9, 1981 do not unnecessarily or invidiously trammel the interests of white teachers and administrators.

The District Court's orders of June 2, 1981 and July 9, 1981 do not unnecessarily or invidiously trammel the interest of white

teachers and administrators, as these orders do not bar whites from continued or future employment in these positions, or operate so as to stigmatize any white persons, either individually or collectively. *Regents of the University of California v. Bakke*, 438 U.S. 265, 373-75 (Brennan opinion) (1978); *Valentine v. Smith*, 654 F. 2d 503, 510-11 (8th Cir. 1981).

The effect of making layoffs proportionate to the prevailing racial/ethnic percentage within the school system is to equalize the burden of layoffs among the races. Therefore, while approximately 1,100 white teachers will have been laid off, so too will be approximately 280 black and 85 other minority teachers. Whereas, the number of principals and headmasters to be laid off is 14 white and one black. Similarly, with recall the current percentages are maintained.

Finally, as to the claim that these orders trammel white teachers' and administrators' collective bargaining rights, such a claim must fail for three reasons. One, as these challenged orders are proper and "lawful", the BTU and BASAS voluntarily subordinated the operation of their respective seniority provisions to the implementation of these orders (A4-38; TA35).[6]

Two, layoff provisions do not, as a general matter, create "indefeasibly vested rights. . .". *Franks v. Bowman Transportation Company*, 424 U.S. 747, 778-78 (1976) (court order pursuant to Title VII awarding retroactive seniority to victims of hiring discrimination, with impact on white employees); *Detroit Police Officers Association v. Young*, 608 F. 2d 671, 681, 696 n. 12 (alteration by City board under authority of City charter);

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6. *See Pellicer v. Brotherhood of Railway and S.S. Clerk*, 217 F. 2d 205 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955) (Union and employer voluntarily modify seniority system to ameliorate past racial discrimination.)

Arthur v. Nyquist, 520 F. Supp. 961, 965 (W.D.N.Y. 1981); *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732, 752-53 (W.D. Mich., S.D. 1980) (alteration by court order).

Three, the positioning of black and white teachers and administrators on their respective seniority lists has been skewed in favor of white teachers and administrators, due to the school defendants' failure to comply with the January 28, 1975 memorandum and orders on faculty recruiting and hiring, and the February 24, 1976 order for desegregation of administrative staff (A1, 6).

V.

The orders of the District Court are in accordance with the opinions from other circuits.

The orders of June 2, 1981 and July 9, 1981 are in accordance with decisions reached by courts in other circuits.[7] Therefore, this case does not present a situation of conflicting authority amongst the circuits, which requires the review of this Court.

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7. *United States v. City of Miami*, 614 F. 2d 1322, 1335-42 (5th Cir. 1980); *Detroit Police Officer v. Young*, *supra*, at 694-98; *Brown v. Neeb*, 644 F. 2d 503, 507-12 (8th Cir. 1981); *Oliver*, *supra*, at 751-55; *Stotts v. Memphis Fire Department*, Nos. 81-5348 and 81-5349 (6th Cir. May 7, 1982); *Boston Chapter N.A.A.C.P. v. Beecher*, No. 82-1642 (1st Cir. May 11, 1982).

CONCLUSION

As the Court of Appeals observed in 1976, "While affirmative action to rectify past discrimination is more painful during a time of underemployment than in one of full employment, that fact is no excuse for inadequate action." (*Morgan, supra,* 530 F. 2d at 434), therefore, there was a continuing duty on the school defendants to desegregate the faculty and staff of the Boston Public Schools, in spite of layoffs.

The District Court's orders of June 2, 1981 and July 9, 1981 were not an abuse of discretion in light of the court's obligation to "make whole" plaintiffs, black parents and their children, and the harm that would have resulted from making layoffs based on "strict seniority".

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

MEMORANDUM AND ORDERS ON PLAINTIFFS' MOTION AS TO ADMINISTRATOR DESEGREGATION FILED AUGUST 24, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-911-G

TALLULAH MORGAN ET AL.,

Plaintiffs,

v.

JOHN J. McDONOUGH ET AL.,

Defendants

September 3, 1976

GARRITY, J. Upon consideration of plaintiffs' motion for enforcement of the court's order on administrator desegregation, and after hearing counsel for the parties and considering affidavits accompanying the motion and exhibits offered at the hearing on August 27, 1976, the court makes the following findings, conclusions and orders:

Findings

* * * * * * * * * * *

2. For several reasons, a number of which are described in a report by the staff of the Citywide Educational Coalition (CWEC)[1] issued August 30, 1976 and entitled "The Promotional

Rating Process, an Analysis", the defendant superintendent and school committee did not carry out the court's order. One of the main reasons was that, after the completion of the screening process by screening committees established by the school committee votes in 1973 and adopted and modified in the court's February 24 order, only 23 black finalists were available to fill the 18 vacancies intended to be reserved for qualified black applicants. This relative shortage of black applicants was attributable in part to the defendants' having violated one of the provisions of the February 24 order, paragraph 2C at page 3, by a recruiting advertisement published in out-of-town newspapers which asserted incorrectly that a prerequisite for appointment was "appropriate Massachusetts administrative certificates (or eligibility)". The upshot was that at a hearing on August 11, 1976 the school committee filed a report on its actions pursuant to the February 24 order indicating that it had appointed 12 black candidates and 24 white candidates, instead of 18 of each group, to the 36 vacancies. The hearing on August 12 was attended by all of the school committee members and the court directed them to carry out the order and to reconsider their rejection of certain black candidates. The school committee reconsidered but did not make any changes in appointments previously made except to change certain of them to acting rather than permanent appointments in order not to violate the plain language of the February 24 order. The same

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s/ W. Arthur Garrity, J.
United States District Judge

Memorandum and Orders

UNITED STATES DISTRICT COURT
For the District of Massachusetts

Civil Action No. 72-911-G

Tallulah Morgan et al.,

Plaintiffs,

vs.

JOHN J. McDONOUGH et al.,

Defendants

Before: Hon. W. Arthur Garrity, Jr.,
District Judge

Court Room No. 5
Federal Building
Boston, Massachusetts
June 16, 1978

Appearances:
Larry J. Johnson, Esq.,
for the plaintiffs.

Goodwin, Proctor & Hoar, Esqs., by
Marshall Simonds, Esq., and
Henry C. Dinger, Esq.,
for the defendant School Committee.

Robert H. Bohn, Esq.,
Assistant Attorney General,
for the state defendants.

Steven P. Perlmutter, Esq.,
Assistant Corporation Counsel,
for the non-School Committee city defendants.

Grady and McDonald, Esqs., by
James T. Grady, Esq.,
for the Boston Teachers Union.

Segal, Roitman & Coleman, Esqs., by
Richard W. Coleman, Esq.,
for the Boston Association of School
Administrators and Supervisors.

Doyle, Playter, Novick & Berkin, Esqs., by
Atty. Caroline B. Playter,
for El Comite de Padres por la Defensa
de la Educacion Bilingue.

Choate, Hall & Stewart, Esqs., by
W. Shaw McDermott, Esq.,
for the Boston Home and School Association.

THE COURT: . . . .

The Court rules that there has not been compliance with the one-to-one hiring requirement in the January 28, 1975, order. The total figures, of course, we know have not-- that is, the goals of hiring have not been achieved. That is given. The defendants have not employed this catchup feature of the January 1975, and the recruiting of minority faculty members has not produced the

hoped-for increase in the percentage of minority faculty in the school system.

It is also relevant that the mode of hiring which the Court had expected would be followed for the most part, with relatively minor exceptions, that is, the offer of permanent positions to new teachers, was not fulfilled. This was not, however, in violation of the order of January 28, 1975.

The Court's findings then -- and that concludes them-- are in terms of result; that is, the results have not been as ordered; but the Court is not making a finding as to the reason why the results were not achieved. I want to state the reason for the Court's intentionally omitting any finding on the matter of whether the failure to achieve the results ordered in January of 1975 were attributable to one reason or another.

MEMORANDUM AND FURTHER ORDERS ON FACULTY RECRUITING AND HIRING

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-911-G

TALLULAH MORGAN ET AL.,
Plaintiffs,

v.

JOHN J. McDONOUGH ET AL.,
Defendants.

July 5, 1978

GARRITY, J. The court has held a series of hearings on the issue of faculty desegregation and compliance with its orders of January 28, 1975 on faculty recruiting and hiring. On June 16, 1978 the court ruled that the school defendants had not complied in various respects with the January 1975 orders[1] and that further remedial orders would be entered. At a hearing on June 29, 1978 the court stated orally the gist of these further orders and gave its reasons for adopting some and rejecting other proposals of the parties.

The principal objective of the orders herein entered is to revive the catch-up feature of the January 28, 1975 orders which have

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1. The court declined to rule whether this non-compliance had been willful, as asserted by plaintiffs, mainly because in our opinion a finding as to willfulness would be superfluous and serve no constructive purpose.

been frustrated by the defendants' discontinuing the appointment of permanent teachers and making a disproportionate number of white provisional teachers permanent by rehiring them until they obtain tenure. A provision in paragraph 6 of that order permitted rehiring of provisionsals; but was expected, in reliance upon representations of counsel representing the defendants at that time that they planned to discontinue hiring provisionals, to have limited and relatively minor applicability. Instead it turned out to be the exception which swallowed the rule. Another objective is the early identification of prospective vacancies in teaching positions so that meaningful recruitment of black and other minority applicants may be conducted.

The court has adopted generally the approach outlined by school defendants' counsel in closing argument by allowing the defendants flexibility in achieving faculty desegregation. The proposals by other parties for specific and narrowly focused relief are denied at this time, not so much for lack of merit as difficulty of monitoring. The court has frequently expressed its intention to disengage from active supervision of the school defendants' carrying out the student desegregation plan as soon as may be done consistently with the constitutional rights of the plaintiff class. The actions of the school committee organized at the beginning of this year justify, we believe, our reliance on orders that look to results more than to the means of achieving them. The mandatory annual (1½% increase in the percentage of black teachers in the school system as a whole is a minimum which, on the basis of abundant evidence at the hearings of past and predictable vacancies in teaching positions and taking declining student enrollments into account, we find to be readily attainable during the next several years without impairing the job security of teachers who are tenured or may be permanently appointed.

Memorandum and Further Orders

The further orders which follow do not replace but supplement previous applicable orders in the area of faculty desegregation which remain in effect unless specifically modified, especially those entered July 31, 1974, January 28, 1975 and August 20, 1975.

ORDERS

1. Paragraphs 6 and 8 of the court's orders dated January 28, 1975 are stricken.

2. Paragraph 1(c) of the January 28, 1975 orders is hereby amended by inserting the words "and given authority" after the words "be authorized" in line 22 of page 7, so that the provision in question will read, "the recruiters visiting the campuses shall be authorized and given authority to hire on the spot applicants who meet qualifications . . . ."[2]

3. In any year in which a shortage of black teachers exists, all hiring and rehiring of teachers, whether permanent or provisional, shall be done by the city defendants on the basis of one black teacher for one white teacher. For the 1978-79 school year only, this order shall not preclude the defendants from rehiring current third year provisionals;[3] however, in the event

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2. At the hearing, defendants professed to construe the original order as merely giving them discretion to authorize on-the-spot hiring of qualified black applicants, a discretion which they declined to exercise.

3. At the hearing on June 29 the court stated that this exemption would apply to second as well as to third year provisionals. However, further analysis regarding their numbers and the likely number off vacancies for 1978-79 makes this change necessary.

the number of white third year provisionals rehired for 1978-79 exceeds the number of black provisionals rehired, only black teachers shall be hired or rehired until the one-to-one balance is restored. The hiring or rehiring of teachers of other minorities shall not count as the hiring or rehiring of a white or a black teacher.

4. Until a shortage of black teachers no longer exists, the city defendants shall see to it that the percentage of black teachers in the school system as a whole exceeds by at least one and one-half percent (1½%) said percentage during the previous school year. If recruiting and hiring procedures [4] in addition to those heretofore and herein ordered by the court should become necessary in order to achieve said annual increase, the city defendants shall select and adopt them, without further court order, sufficiently in advance of the beginning of the school year.

5. Although no specific goals are set regarding the rehiring and hiring of other minority teachers,[5] the city defendants shall use their best efforts to continue to increase the percentage of other minority teachers in the school system overall and in the area of regular education.

6. The reporting ordered in paragraph 9 of the January 28, 1975 orders shall be expanded as follows:

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4. Examples include (a) offering applicants permanent instead of provisional teaching positions or monetary incentives such as moving expenses, (b) eliminating residency requirements, (c) modifying the excessing policy and (d) hiring only black and other minority teachers.

5. The record does not support the establishment of a specific goal for the hiring of other minority teachers. However, future developments may require the court to re-examine this ruling.

Memorandum and Further Orders

(a) The reports due March 15 and October 15 shall contain tables showing (i) the number and percentages of white, black and other minority teachers in regular, special, bilingual education for the current year and the previous three years, (ii) the number of black, white or other minority first, second and third year provisionals currently employed and provisionals hired for a fourth year (thereby becoming "permanent provisionals"), (iii) the number of newly hired provisional teachers for the current year and the previous three years subdivided by subject areas to which assigned and (iv) the same information set forth in iii as to newly appointed permanent teachers if the defendants resume their former practice of appointing permanent teachers.

(b) the following provision shall be added at the end of paragraph 9(a): "--prospective vacancies in teaching positions shall be listed as they become identified, whether or not to be filled by transfers of teachers or new appointees; and vacancies shall be asterisked or otherwise designated which are likely to be filled by newly hired teachers or rehired provisionals".

7. The Department of Implementation shall collaborate with the Department of Personnel in identifying prospective vacancies in teaching positions and relating the deployment of faculty to building needs and capacities and program locations resulting from the assignment of students so that vacancies in teaching positions may be ascertained as soon as possible. As the number of vacancies to be filled by new appointees becomes known, the Department of Implementation shall keep its recruiting specialists informed so that they may hire qualified black and other minority applicants on the spot.

s/ W. Arthur Garrity, Jr.
United States District Judge

SCHOOL DEFENDANTS' MOTION FOR MODIFICATION OF FACULTY DESEGREGATION ORDERS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 72-911-G

TALLULAH MORGAN, ET AL.,

Plaintiffs,

v.

JOHN O'BRYANT, ET AL.,

Defendants.

In light of the fiscal crisis facing the Boston Public Schools and the corresponding need to reduce dramatically the size of the teaching staff, the School Defendants move for modification of outstanding faculty desegregation orders in accordance with a draft order attached as Exhibit A to this motion. A memorandum of law accompanies this motion.

Respectfully submitted,

THE SCHOOL DEFENDANTS

By their attorneys,

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ORDER MODIFYING FACULTY DESEGREGATION ORDERS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 72-911-G

TALLULAH MORGAN, ET AL.,

Plaintiffs,

v.

JOHN O'BRYANT, ET AL.,

Defendants

The School Defendants remain under a court-ordered obligation during the 1981-82 school year to increase the percentage of black teachers until the percentage of black teachers is not less than 20%. This obligation exists whether the teaching force is expanding or contracting and the relevant collective bargaining agreements are expressly subject to this and other court-ordered obligations. Notwithstanding the orders imposing such an obligation, which remains in effect, the School Defendants shall be deemed to be in compliance for the 1981-82 school year with the outstanding orders if they implement the layoffs caused by the immediate fiscal crisis in accordance with the following procedure:

1. The layoffs will be performed in such a way that the systemwide percentage of black teachers will remain at the current level of 19.09%.

Order Modifying Faculty Desegregation Orders

2. Blacks will receive an absolute preference for recall until a 20% figure is reached systemwide.

3. Once this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled will be blacks.

The obligation to engage in affirmative recruitment of black teachers until the relevant percentage equals 25% is suspended until all tenured teachers who will have been laid off have been recalled.

The obligations imposed by this and prior orders shall supersede any inconsistent state statutes, including Mass. G.L. c.71, §41.

_____

District Judge

MOTION FOR MODIFICATION OF ADMINISTRATOR DESEGREGATION ORDERS TO PERMIT REASSIGNMENT AND REDUCTION OF HEADMASTERS AND PRINCIPALS FOR THE 1981-82 SCHOOL YEAR BY MEANS OF SENIORITY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, et al.,

Plaintiffs

v.

JOHN O'BRYANT, et al.,

Defendants

On June 6, 1981, the Boston School Committee voted to conduct the reduction and reassignment of principles and headmasters in accordance with principles of strict seniority. The School Defendants move this Court for leave to do so and for the modification of outstanding orders governing administrator desegregation necessary to permit such action.

If the Court is disposed to deny this motion, the School Defendants request guidance from the Court regarding the application of the Court's orders governing administrator desegregation in a reduction in force context.

Respectfully submitted,

THE SCHOOL DEFENDANTS

Motion for Modification of Administrator Desegregation Orders

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No. 81-2124

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

BOSTON ASSOCIATION OF SCHOOL
ADMINISTRATORS AND SUPERVISORS, AFL-CIO
Petitioner,
v.
TALLULAH MORGAN, et al,
Respondents

No. 81-2306

LOCAL 66, BOSTON TEACHERS UNION
AFT-AFL-CIO,
Petitioner,
v.
BOSTON SCHOOL COMMITTEE, ET AL,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

RESPONDENT MASSACHUSETTS BOARD OF EDUCATION'S BRIEF IN OPPOSITION

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No. 81-2124

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LOCAL 66, BOSTON TEACHERS UNION, AFT-AFL-CIO,
Petitioner,

v.

BOSTON SCHOOL COMMITTEE, ET AL,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

RESPONDENT MASSACHUSETTS BOARD OF EDUCATION'S BRIEF IN OPPOSITION

The respondent Massachusetts Board of Education respectfully requests that this Court deny both petitions for writ

of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 671 F. 2d 23.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Court has previously denied certiorari to petitioner Boston Teachers Union ("BTU") on substantially similar claims.

Petitioner BTU's claim that the orders below fail to cure a constitutional violation, since the absence of a 20% black faculty does not offend the constitution (BTU Petition, pp.11-15), simply reiterates a previously mounted and failed challenge to prior orders in this litigaion, and thus does not now warrant plenary consideration by this Court. Among its liability findings in

1974, the district court found that defendant Boston School Committee knowingly violated the constitutional right of public school students to have the school system operated free of racial discrimination in the recruiting, employment and promotion of teachers and staff. Morgan v. Hennigan, 379 F. Supp. 410, 456 (D. Mass. 1974). Included among its orders seeking to "eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregation previously practiced by the defendants," Id., at 484, have been orders directed toward faculty desegregation. These orders, previously entered and sustained on appeal, are the law of the case.

Interim orders entered on July 31, 1974, effective only for the 1974-1975 school year, mandated a hiring rate of

one new black teacher for each new white teacher hired, and directed proportionate assignment of black faculty throughout the school system. When the BTU challenged those orders as unrelated to the constitutional violation, the United States Court of Appeals for the First Circuit rejected the union's argument as "untenable as a challenge to remedies ordered to begin the dismantling of a dual school system." Morgan v. Kerrigan, 509 F. 2d 580, 600 (1st Cir., 1975) cert. denied, 421 U.S. 963 (1975).

In 1975, the district court entered its remedial orders for faculty desegregation, requiring, among other things, a continuation of one-to-one hiring until 20% of the faculty was black, with additional affirmative action obligations to continue until 25% of the faculty was

black. Morgan v. Kerrigan, 388 F. Supp. 581 (D. Mass., 1975). The BTU appealed this order, specifically questioning the propriety of a 20% hiring goal; but the appellate court again affirmed the lower order, specifically finding that the 20% hiring goal was not an abuse of discretion. Morgan v. Kerrigan, 530 F. 2d 431, 434 (1st Cir., 1976). This opinion, and its endorsement of the 20% hiring goal, was the subject of a previous petition for a writ of certiorari, No. 75-1527, which petition was denied. 426 U.S. 935.

Similarly, a 1976 district court order, reprinted at pp. A23-A34 of petitioner Boston Association of School Administrators and Supervisors' ("BASAS") petition, mandated among other things, one-to-one hiring of administrators in specified categories until 20% of the

administrative staff was black, with additional affirmative action obligations to continue until 25% of the administrative staff was black. That order was not appealed and remains the law of this case.

II. The Court below fully considered and correctly decided the issues, applying the appropriate constitutional standards.

The 20% black staff requirement is not merely an internal affirmative action goal as petitioners characterize it in their petitions; it is instead a judicially-imposed remedial step towards the attainment of a unitary school system. Thus, when defendant School Committee sought authorization to lay off teachers so as to preserve the then-current 19.09% level of black faculty,

the courts below properly analyzed the request under the three-pronged test for remedial orders in school desegregation cases articulated in Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II). First, given the liability finding that the creation and maintenance of a dual school system had deprived black children and parents of equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution, the request to preserve a partially achieved, previously ordered remedy was "related to the condition alleged to offend the constitution." Milliken II at p. 280, citing Milliken v. Bradley, 418 U.S. 717, 738 (1974) (Milliken I); Morgan v. O'Bryant, 671 F. 2d 23, 26 (1st Cir., 1982). Second, by preserving the then current level of black faculty, a level obtained only through the

imposition of prior remedial orders to redress constitutional deprivations by defendant School Committee, the orders sought "as nearly as possible to restore the victims of discriminatory conduct, " here the black school children, "to the position they would have occupied in the absence of such conduct." Milliken II at p. 280, citing Milliken I at p. 746; Morgan v. O'Bryant, Id. at 27-29. Third, by endorsing the proposal of defendant School Committee, the local authority most directly affected by the orders, the lower courts obviously "[took] into account the intent of state and local authorities in managing their own affairs, consistent with the Constitution." Milliken II at pp. 280-281; Morgan v. O'Bryant, Id. at 29.

A similar Milliken II analysis led the courts below to reject defendant School Committee's motion to modify remedial orders regarding school-based administrators so as to permit, through layoffs based on seniority, a reduction of the then-current 20.53% level of black principals and headmasters. The analysis is identical to that regarding faculty layoffs in relation to the first two prongs of the Milliken II test; and while, in the area of administrative staff reductions, the courts rejected a proposal from local authorities, the third prong of Milliken II was satisfied. Further, Milliken II does not prohibit federal courts from ordering school authorities to act or refrain from acting where their proposed policies would not represent "good faith implementation of the governing constitutional principles."

Brown v. Board of Education, 349 U.S. 294, 299 (1955) (Brown II). In such circumstances, where the preferences of local authorities indicate a failure to meet the affirmative obligation to eliminate racial discrimination root and branch, judicial authority is properly invoked. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971), citing Green v. County School Board, 391 U.S. 430, 437-438 (1968); Morgan v O'Bryant, Id. at 29. The requirement that the Court consider the preferences of the local authorities does not mandate that the Court defer to a policy which will perpetuate the effects of invidious racial discrimination.

III. The cases relied on by petitioners are distinguishable on their facts.

Both petitions, through extensive argument and citation, attempt to redefine the nature of this litigation. As the Court of Appeals noted in an earlier challenge to remedial orders involving teacher hiring:

> "Appellants seem to premise much of their argument on the assumption that the district court's orders relating to faculty and staff must be confined to those actions necessary to vindicate the rights of black teachers and applicants for positions who have been discriminated against. Appellants misapprehend the nature of this case. While the district court properly examined defendants' hiring, transfer, and promotion policies, it did so to determine whether those policies violated the rights of black school children. It is the rights of those children that the district court must now protect."

Morgan v. Kerrigan, 509 F. 2d 599, 600 fn. 3 (1975).

In a later reiteration of this point,

the appellate court noted:

> "The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. . . It is the rights of those [black Boston public school] children that the order in issue is intended to protect."

Morgan v. Kerrigan, 530 F. 2d at p. 432.

References to Title VII of the Civil Rights Act of 1964, and cases decided under that statute, are therefore misguided, since this is not a Title VII employment discrimination case. Similarly, citation of cases construing the equal protection clause of the Fourteenth Amendment in cases of employment policy misses the point that this litigation involves the vindication of the constitutional rights of black school children. This case is a school desegregation case. Petitioners should more properly address the line of cases which emphasizes the relationship between faculty-staff

considerations and school desegregation. See e.g. Rogers v Paul, 382 U.S. 198 (1965); Bradley v School Board of City of Richmond, 382 U.S. 103 (1965); United States v. Montgomery County Board of Education, 395 U.S. 225 (1969); Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1979); Morgan v. Kerrigan, 509 F. 2d 580 (1st. Cir., 1974). After all, staff segregation "is among the most important indicia of a segregated system." Swann, Id. at p. 18 citing Green v. County School Board, 39 U.S. 430 (1968).

IV. Petitioners'arguments regarding public policy and balancing of equities are without merit.

Both petitions, and particularly that of the BTU, make policy arguments intending to demonstrate the need for

this Court to grant certiorari so that it may more properly balance the equities. These arguments are misquided and often contrary to the facts.

(1) The BTU is in error when it states that "long-term white teachers... carry the entire burden of accomodating to a sharply reduced school budget." (BTU Brief, p.9). Under the challenged order, which mandated that the current percentage of black teachers be retained, the substantial number of layoffs at issue clearly reached black teachers, albeit less senior black teachers, as well as white teachers.

(2) The cases concerning layoffs of police and firefighters, cited at p.10 of the BTU Brief, need not be considered in conjunction with the present case. Those opinions involve the interpretation of consent decrees and the propriety of

orders enforcing the decrees as so interpreted. This case concerns the achievement of a remedy after a finding of liability under the United States Constitution. Furthermore, the controversy involving police and firefighter layoffs directly implicated a state civil service statute. Mass. G.L. c.31, §39. The state civil service statute does not apply to teachers, and this case therefore presents no conflict between a duly enacted statutory scheme and remedial orders of the Court.

(3) Both petitions gloss over the impact of allowing layoffs based on strict seniority. The percentage of black teachers in the Boston Public Schools was 7.1% at the time of the liability finding. As the BTU notes, defendant School Committee projected that the then-current 19.09% of black teachers

would drop to approximately 8% if 1200 layoffs were conducted in June 1981 according to strict seniority; the defendants also indicated that the elimination of an additional 400 positions, contemplated at the time of their motion, would have reduced the number of black teachers in the system to below 5%. BASAS acknowledges that, had the contemplated layoffs been achieved through strict seniority, the then-current level of 20.53% black principals and headmasters would have fallen to 13.8%. Both petitioners ignore the directive of this Court that a district court is obligated to exercise continuing jurisdiction until it is clear that state-imposed segregation has been completely removed. Green v. County School Board, Id. at 439.

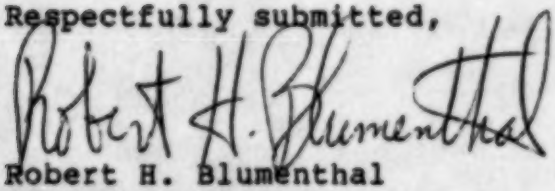
(4) Both petitioners attack the orders on policy grounds, although a reversal of these orders would create its own policy anomalies. Had the district court been prohibited from protecting its previous remedial orders through conditional orders requiring that any layoffs that defendant School Committee chose to implement must be conducted so as to preserve current percentages of black staff, a situation would have arisen in which either (a) layoffs would have eliminated gains made in pursuit of a constitutional remedy under long-standing orders, or (b) the threatened nullification of the remedy would have prohibited defendant School Committee from conducting any layoffs in response to financial constraints unrelated to desegregation. Given the alternatives,

the lower courts were correct as a matter of public policy as well as law.

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,



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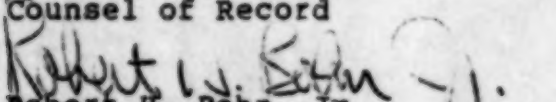

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DATED: July 16, 1982

CERTIFICATE OF SERVICE

I, Robert H. Blumenthal, counsel of record, hereby swear that I have this day served the within Respondent Massachusetts Board of Education's Brief in Opposition by mailing three copies postage prepaid to: Paul F. Kelly and Richard W. Coleman, 11 Beacon Street, Boston, Massachusetts, 02108, counsel for petitioner Boston Association of School Administrators and Supervisors, AFL-CIO; and to Bruce A. Miller, 2400 First National Building, Detroit, Michigan, 48226, counsel for petitioner Local 66, Boston Teachers Union, AFT-AFL-CIO.

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My Commission expires: 11/14/86

DATED: July 16, 1982

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81-2124

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

CONCERNED BLACK EDUCATORS OF BOSTON,
INTERVENOR, RESPONDENT.

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Is a judicial order in a school desegregation case equitable and constitutional where that order simply implements remedial orders which had been previously entered into by the District Court, and where that order, as well as the earlier remedial orders, were solely designed to rectify unconstitutional conditions which the District Court found to have existed in the school system?

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TALLULAH MORGAN, ET AL.,
RESPONDENTS.

CONCERNED BLACK EDUCATORS OF BOSTON,
INTERVENOR, RESPONDENT.

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Concerned Black Educators of Boston (CBEB), an organization of black teachers permitted to intervene as plaintiffs-intervenors in the above-entitled case, oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit brought by the Boston Association of School Administrators and Supervisors, AFL-CIO, requesting this Court to review the First Circuit's judgment in *Morgan et al*

v. *O'Bryant, et al.*, (C.A. 1, Nos. 81-1561, 81-1617, 81-1619, and 81-1646; February 17, 1982).

Summary of the Argument.

The Petition for a Writ of Certiorari of the Boston Association of School Administrators and Supervisors, AFL-CIO [BASAS] seeks to reverse the decision of the District Court for the District of Massachusetts entered July 19, 1981, ordering that the current percentage of Black administrators be maintained even in the face of layoffs of administrators.

BASAS argues that the court should have sustained the motion of the School Committee to permit the reassignment and reduction of headmasters and principals for the 1981-82 school year by means of seniority alone. Approval of such a motion would have reduced the ratio of Black category I administrators from 20.53% to 13.8% (Appendix [A] 4).

However, rather than allowing the progress made during this 7-year old desegregation case to be nullified in a single year, the Court ordered that existing percentages of the Black administrators be maintained. In so doing, the court did nothing more than to preserve the integrity of its earlier orders with respect to administrative desegregation, an order from which BASAS did not appeal. The court's initial orders were designed to remedy specific constitutional violations found by the District Court and affirmed by the First Circuit Court of Appeals, violations which included intentional segregation in the hiring, promotion and assignment of Black administrative personnel. The order entered into by the District Court in 1981 was simply designed to implement those remedial orders and to insure that the progress already made towards a desegregated school system would not be dismantled. Each of the

orders was carefully constructed so as to restore the victims of discrimination — the school children of Boston — to the positions they would have occupied in the absence of discriminatory conduct. Until Black students are able to enjoy the status that they would have enjoyed had there not been this sorry history of discrimination, the District Court's authority to continue to fashion remedies consistent with its finding of liability remains.

Much of the argument contained in CBEB's Opposition to the Petition for a Writ of Certiorari filed by the Boston Teacher's Union is applicable to the present opposition and should be incorporated where appropriate. Just as the Court has equity powers to preserve the integrity of its prior orders with respect to faculty, so does the court have equity power to preserve integrity of prior orders regarding administrators. Just as the Court has the authority to make race-conscious decisions regarding faculty, so does the court have remedial authority to make race-conscious decisions regarding administrators.

The District Court has done nothing which is inconsistent with applicable decisions of this Court and of the lower federal courts. In short, none of the criteria for certiorari has been met.

Reasons for Opposing the Writ.

I. The Decision Below is Consistent with General Principles of Constitutional Law Articulated by this Court and by the Lower Federal Courts.

BASAS, in its Petition for a Writ of Certiorari, mischaracterizes the Court's 1981 order and the applicable case law. The 1981 order is not enforcing a particular racial balance as a matter of substantive constitutional right, any more than the

orders of the District Court did in 1975 and 1976. The Court made a finding that the constitution had been violated because a dual school system existed. As part of that finding, the Court found that the defendants intentionally segregated Black staff, and intentionally discriminated against Blacks in the hiring and promotion of Black administrators. The Court's initial orders in the case, requiring 20% administrative staff and affirmative recruitment until the ultimate goal of 25% Black administrators was reached, was a temperate response to that constitutional violation. Of significance is the fact BASAS never appealed the 1976 order. In 1981, when conditions threatened that remedy, new orders were entered by the Court designed to preserve the gains already made. The underlying findings of the District Court are unassailed and unassailable; the remedial orders in 1976 and now in 1981 flow naturally from those findings. All that the court has done is to preserve the integrity of its prior orders regarding principals and head masters. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Oliver* v. *Kalamazoo Board of Education*, 498 F.Supp. 732 (W.D. Mich. 1980) (appeal pending).

The cases cited by BASAS are inapplicable. *Steel Workers* v. *Weeber*, 443 U.S. 193 (1979) and *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) do not involve carefully drafted remedial orders entered by a court after specific findings of constitutional violations. Rather, they involve private affirmative action arrangements, not subject to prior court scrutiny and attention. The Court has been quite clear that once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of discrimination. *Regents of the University of California* v. *Bakke*, 438 at 305 (Powell, J.); *Id.* at 362-379 (Brennan, White, Marshall and Blackman, JJ., concurring in the judgment in part and disent-

ing in part); *Fullilove* v. *Koutznick*, 448 U.S. 448, 477-78 (1980).

Franks v. *Bowman Transportation Company*, 424 U.S. 747 (1976) is also mis-cited. BASAS argues that the District Court's order discriminates in employment and lacks the proper factual findings because no minority individuals have been identified as the victims of any discrimination. But as the District Court has said numerous times, and as the Court of Appeals has reaffirmed, victims in the instant case are the Black school children, not the possible hiring discriminatees. *Morgan* v. *Kerrigan*, 530 F.2d 431, 432; *Morgan* v. *Hennigan*, 379 F.Supp. 410, 456 (D. Mass. 1974); *Morgan* v. *Kerrigan*, 509 F.2d 580, 600 n.3 (1st Cir. 1974).

Next, BASAS suggests that even Black school children are not benefitted by this order because there were "no findings" made by the court that the plaintiffs' required role models in order to be made whole. Indeed, taking a single quote from the District Court's 1974 opinion out of context, they imply that the District Court found that the role model thesis was invalid. (BASAS Petition, p. 9).

It was the defendants in the instant case who initially proposed the role model theory in order to justify predominantly black faculty and staff in black neighborhoods. The court patently rejected such a justification; to hold otherwise would have been to affirm a dual school system. 379 F.Supp. 410, 460 (D. Mass. 1974).

But the District Court hardly rejected the thesis where it applied to having an appropriate black presence on the faculty and staff throughout the Boston Public School System. That was plainly the basis for the 20% figure. 379 F.Supp. at 466.

II. The Decision Below is Consistent with Settled Principles of Remedy in Desegregation Cases.

The District Court's decision was completely consistent with the standards for equitable remedies in school desegregation cases set forth by this Court in *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977). (See opposition to Petition for Writ of Certiorari filed by Local 66, Boston Teachers Union, AFT, AFL-CIO, pp. 6-12.)

As has been argued in CBEB's Opposition to the Petition for Certiorari filed by the Boston Teachers Union, the Court's decision with respect to administrators plainly met both the first and second *Milliken* requirements. With respect to the third criterion, the importance of taking into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution, *Milliken* v. *Bradley*, 433 U.S. at 280-281, judicial deference is not without limits. As the Court noted in *Milliken*, if, however, "school authorities fail in their affirmative obligations . . . judicial authority may be invoked." 433 U.S. at 280-281. Plainly, in the instant case, the Boston School Committee failed to carry out their affirmative obligation to remedy the constitutional violation found by the Court. Moreover, as the Court of Appeals found, the order is not particularly intrusive into local affairs. It simply requires compliance with earlier orders, without becoming involved in local matters such as control of the budget, etc. Moreover, the Court pointed to the fact that the School Committee itself took no position in the appeal of its order, noting that, under the circumstances, "it is difficult to accept an argument premised on that body's interest in maintaining its own affairs." (A. 13.) Indeed, for the Court of Appeals, the other local authority involved, the State Board of Education, filed a brief in support of the District Court's order.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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